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RULE 11: FRAMEWORK FOR DEBATE

*Jerold S. Solovy and Laura A. Kaster**

The hue and cry against the unpredictable results, the clear bias against plaintiffs, increased incivility, and the cottage industry of satellite litigation spawned by Rule 11 has finally borne fruit. The Rules Committee has recognized Rule 11 must be addressed "to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." This recognition, and specific revisions to the Rule proposed by the Rules Committee, now call for a serious national debate by the bar, the bench, and Congress. Every litigator and every client has a stake in the outcome.

The real purpose of Rule 11, as is or as revised, its efficacy in meeting its stated goal, and the fairness of its application must be weighed against the attendant dangers and countervailing policies. The articles, and the alternative proposed rules contained in this issue, will form an important framework for the debate.

Judge Sam D. Johnson of the Fifth Circuit Court of Appeals is the author of the seminal decision interpreting Rule 11, *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc). The *Thomas* decision anticipated the Supreme Court in focusing on the deterrent effect of sanctions and rejecting the uniform award of attorneys' fees. It therefore made clear that the courts were to impose "the least severe sanction adequate to serve the purpose" of deterrence. The *Thomas* Court noted, as Judge Johnson and his clerks do in their article here, that courts tend to forget the enormous sting of public criticism and the serious professional and personal consequences that follow from a ruling that their filings are sanctionable. In light of experience following the *Thomas* decision, Judge John-

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* Partners in the Chicago Law Firm of Jenner & Block. Co-authors of SANCTIONS IN FEDERAL LITIGATION, Solovy, Kaster, Hirsch & Thompson (Butterworth 1991).

son's article rejects the notion that the mere formulation of the "least severe sanction" standard, now contained in the Rules Committee's proposed revision to Rule 11, will reverse the avalanche of decisions that routinely shift the cost of litigation and impose attorneys' fees without even examining alternative sanctions. Judge Johnson's experience and sensitivity to the real problems of both the courts and lawyers requires that his comments receive serious attention in the forthcoming debate. Judge Johnson casts doubts on the ability of appellate courts to supervise the now habitual grant of fees in light of the deferential standard of review applicable to Rule 11 cases. He calls for more findings by district courts, heightened review, and the elimination of the award of fees in all cases save those involving bad faith.

The alternative bench-bar proposal to revise Rule 11 (shepherded by John P. Frank) also takes note of the undue incentive to litigate engendered by the fee shifting aspects of Rule 11. The proposal would entirely eliminate attorney fee awards and would make any sanction discretionary. The bench-bar proposal also objects to the Rules Committee's imposition of a continuing duty and to the increased exchange of paper called for in the Rules Committee's "safe-harbor" proposal. Like Judge Johnson, the alternative proposal would require findings of fact and conclusions of law.

Professor George Cochran, with whom we have joined in representing attorneys who have been demoralized by the mere pendency of Rule 11 motions, has an even stronger reaction to the Rules Committee's proposal. He sees no hope for a Rule purportedly aimed at "frivolous filings," which were not a problem in the first place. Professor Cochran's contention is that the Rule was not well conceived, and has been erratically applied and improperly used to stifle creative lawyering. He articulates the well-grounded fear that Rule 11 is in reality simply a sword of Damocles held over lawyers in the trenches so that the courts may deal with fewer and perhaps more lofty disputes. He suggests that the first reduction in filings should take place in the field of sanctions. Rule 11 motions will no longer be a routine adjunct to all other motions if the rule is eliminated. He points out, as does Judge Johnson, that following the *Thomas* decisions

a clear articulation of the "least severe sanction" has been largely ignored by the district courts. Professor Cochran raises serious doubt whether rewording the Rule will curb the abuses everyone now acknowledges.

All of these materials deserve careful attention; their concerns and criticisms must be addressed and dealt with if any revision of Rule 11 is to meet the felt needs of those who are most familiar with the past operation of the Rule. Most of all, these articles should encourage the participation of the entire legal community in the forthcoming debate over amendment or repeal of Rule 11. This is a debate which the legal community cannot afford to ignore.

RULE 11: THE ROAD TO AMENDMENT

*George Cochran**

> [I]f I were all of you, I'd be real careful about what you sign and file in this Court, being mindful of the strictures of Rule 11, unless you got an extra eight or $10,000 in your bank account that you'd like to pay as a penalty . . . .[1]

Less than three years ago, I joined in the conclusion that "Rule 11 can be interpreted sensibly."[2] The reason was the sympathetic, lawyer-sensitive approach adopted by Judge Johnson in his *en banc* opinion for the Fifth Circuit in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988). Expectations raised by *Thomas* have not been fulfilled and the conclusion is now warranted that no amount of judicial construction

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* Professor of Law, University of Mississippi. For the past three years, the author has headed the Rule 11 Project established by the Center For Constitutional Rights. It is with a sense of deep respect and personal friendship that he expresses thanks to Morton Stavis, President of the Center. Without the benefit of his over twenty-five years of experience in defending lawyers as well as an indefatigable, intellectual and moral approach to the search for justice, the Project would not have been possible. In addition, I extend thanks to Steve Burbank, Georgene Vairo, Jerry Solovy, Laura Kaster and Alan Morrison. Each has given freely of their time in Center cases and played critical roles in assisting in the defense of lawyers targeted by the Rule. Finally, my appreciation is extended to the staff of the Center and Elizabeth Hudson of the Law School.

[1] Webster v. Sowders, 846 F.2d 1032, 1040 (6th Cir. 1988)(quoting District Judge Bertelsman of the Eastern District of Kentucky). If this does not make the point, see Zambrano v. City of Tustin, 885 F.2d 1473, 1484 (9th Cir. 1989)(threats of criminal contempt and leg irons; appellate courts "cannot be blind to the situations where trial courts overreact to perceived or minor slights."). Or:

> [Some judges] can be very arbitrary and, believe it or not, not very clever. Many judges, like it or not, don't know what is going on and a lot of them have deep-seated biases and are out to get particular lawyers. And boy, Rule 11 is some tool to do it with.

Weis, *A Practitioner's Commentary On The Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 26 (1985); *cf.*, STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833)(district judge escapes impeachment by one vote for sanctioning lawyer writing disparaging letter to newspaper).

[2] G. COCHRAN & G. VAIRO, *Rule 11: An Eventful Year*, CIVIL RIGHTS LITIGATION & ATTORNEY FEES ANNUAL HANDBOOK 343, 360 (1988).

can satisfactorily resolve the myriad of problems which the Rule has generated.

I will not rehearse the standards nor replow in detail the last six years of experience under the amended Rule.[3] I also do not write on behalf of those who see the federal judicial system as a forum for abuse. My concerns are the ones shared by many who have followed the tortuous path taken since 1983: the stifling of creative litigation, the devastating professional and financial consequences to attorneys litigating in good faith, and a new form of time-consuming, destructive satellite litigation which should not be tolerated.

Looking back to 1983, one has to remember allegations related to the use and status of the federal courts. The environment then, as now, was supercharged by the still unresolved controversy over the existence and/or cause of a "caseload crisis."[4] Charges of "lawyer incompetence" were being leveled by the Chief Justice.[5] Finally, there were issues of abusive litigation tactics[6] and the perceived need to "streamline the litigation process by lessening frivolous claims or defenses."[7]

Although there is no doubt that each of these concerns warrants serious consideration, the Committee acted precipitously

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[3] The sanctions phenomenon has produced three substantial treatises. *See* G. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (1989); G. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES & PREVENTIVE MEASURES (1990); J. SOLOVY, L. KASTER, N. HIRSCH & J. THOMPSON, SANCTIONS IN FEDERAL LITIGATION (1991). The amendment of the Rule has also been followed by a significant body of critical commentary in the law reviews. *See* G. VAIRO, *supra*, at F-1—F-31 (listing all law reviews by author, date, and subject matter).

[4] *See, e.g.*, Rotunda, *Lawyers & Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOYOLA U. CHI. L.J. 1149, 1159 (1987).

[5] *See* C. WOLFRAM, MODERN LEGAL ETHICS 185 n.2 (1986) (detailing Chief Justice Burger's dissatisfaction with American bar).

[6] Congress surveyed the problem when it amended 28 U.S.C. § 1927 in 1980. *See Antitrust Procedural Improvement Act of 1979: Hearings on S.390 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Antitrust Procedural Improvements & Jurisdictional Amendments: Hearings on H.R. 4047 Before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); H. CONF. REP. No 96-1234, 98th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2781; 126 CONG. REC. 23625-26 (1980)(section 1927 designed to deter abusive litigation practices).

[7] FED. R. CIV. P. 11 (Advisory Committee Note).

when it amended Rule 11. Prior to 1983, it had little experience with sanctions and no knowledge of the costs and benefits either to the judicial system or attorneys that would occur by expanding the scope of sanctionable conduct.[8] The choice to proceed without in-depth consideration of the ramifications left many questions unanswered.

Other than anecdote, how much evidence is there that "frivolous" litigation poses a serious strain on judicial resources? Within this segment, what percentage is subject to control by trial judges under expanded powers granted by Rule 16 or existing sanctioning provisions? Even assuming that the problem is sufficient to warrant attention, what are the costs and benefits resulting from the increased use of court time for sanctions as compared to summary procedures previously employed? How relevant are the considerations set forth by members of the Supreme Court that underlie an institutional decision not to sanction "frivolous" filings? How does one define what is "reasonable" or "frivolous"? Is the Rule written so broadly that it will result in charges that judges philosophically predisposed to reject arguments as to the scope of existing law and/or those seeking to expand existing precedent will abuse their powers under the Rule? What are the consequences to the courts and to the bar of a new form of motion practice coupled with the carrot of fees that places competence of counsel directly at issue? What exactly is "deterrence," and how can it be tailored to the circumstances of each individual attorney found in violation? How much due process should be afforded and what factors are to be employed to develop a cost/benefit analysis which correctly balances interests of the bar against the expanded consumption of judicial resources? What requirements should be placed on the district courts with respect to development of the record and findings of fact and conclusions of law? Once a violation is found, what percentage of those cases would be expected to go on appeal? What of those cases in which sanctions are denied?

I suggest that if these issues had been given serious consideration, the Rule would not have been amended to its present

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[8] Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989).

form. The problems surfacing since 1983 are intractable and no amount of judicial construction can satisfactorily reduce the potential for abuse. Even more important, the minimal benefits derived from the Rule are far outweighed by the needless time and energy expended by both the district courts and courts of appeal in a futile attempt to insure fair and uniform results.

CURRENT STATUS — AN OVERVIEW

(1) *The Problem of Determining Violations*: — It is now common Rule 11 lore that prior to filing suit attorneys "need not have in hand . . . enough proof to establish"[9] the case and that merely "weak"[10] cases are not sanctionable. Counsel need not conduct a pre-filing investigation that is "not cost-justified,"[11] and may file his complaint and safely proceed with discovery when he believes that "some wrongdoing [is] afoot."[12] Proceeding on the basis of facts detailed by one's client becomes a sanctionable event only if the court concludes that it was not "reasonable" to believe that credibility would be resolved in the client's favor.[13] What counts as having "enough proof" to proceed, or when a lawyer must take issue with his client's version of a case, assume the role of judge and jury, and advise against litigation, remains unexplained.

Development of precedent with respect to the reasonable inquiry of law requirement has produced similar consequences. Two years after amendment, the Federal Judicial Center docu-

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[9] Samuels v. Wilder, 906 F.2d 272, 274 (7th Cir. 1990).

[10] Davis v. Carl, 906 F.2d 533, 536 (11th Cir. 1990).

[11] Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. denied*, 458 U.S. 901 (1988).

[12] Lebovitz v. Miller, 856 F.2d 902, 906 (7th Cir. 1988). *But see* Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991).

[13] Lemaster v. United States, 891 F.2d 115, 121 (6th Cir. 1989)(offering party must "reasonably think" that client is credible). *Compare* Blue v. United States Dept. of Army, 914 F.2d 525 (4th Cir. 1990) (keying sanctions to confused and contradictory testimony of clients), *cert. denied*, Chambers v. United States Dept. of Army, 111 S. Ct. 1580 (1991) *with* Hayden v. Mutual of Omaha Ins. Co., 122 F.R.D. 11, 13 (S.D.N.Y. 1988) ("nervous, or frightened and confused" client may not have articulated on stand what he told his lawyer) *and* District No. 8, Int'l Ass'n of Machinists & Aerospace Workers v. Clearing, 807 F.2d 618, 622 (7th Cir. 1986)(reversing sanction based on witness credibility).

mented the proposition that on the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the Rule.[14] Courts of appeal now concede that they "have been required with some regularity to reverse district court awards of sanctions."[15] Lawyers sanctioned by the district court for bringing "frivolous" cases, have secured reversals not only of sanctions but also on the merits.[16] Cases abound in which appellate panels split on the issue of whether legal arguments are sufficiently frivolous to warrant sanctions.[17] Identical arguments raised before the same district court are "held in one case not to violate rule 11, but to 'egregious[ly] violate it in the next'. . . ."[18] Arguments found frivolous and sanctionable by a district court are, less than a year later, found meritorious by the United States Supreme Court.[19] Lawyers not sufficiently prescient to anticipate decisions by the Supreme Court, find that they have "waived" arguments on appeal even though the issue in question, if raised at trial, would have warranted the imposition of sanctions by the district court.[20]

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[14] S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 17 (Federal Judicial Center 1985). *See also id.* at xi (even in fairly routine cases "there is a good deal of interjudge disagreement over what . . . constitute[s] a violation of the rule.")

[15] Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344-45 (9th Cir. 1988).

[16] Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990); Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir 1988); Operating Eng'rs, 859 F.2d at 1343; Great Hawaiian Financial Corp. v. Aiu, 863 F.2d 617, 622 (9th Cir. 1988); Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805 (2d Cir. 1987); Kucel v. Walter E. Heller & Co., 813 F.2d 67, 74 (5th Cir. 1987); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1987).

[17] *E.g.*, Federal Sav. & Loan Ins. Corp. v. Molinaro, 923 F.2d 736 (9th Cir. 1991); Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991); Alia v. Michigan Supreme Court, 906 F.2d 1100 (6th Cir. 1990); International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 563 (1989); Enterprise Management Consultants, Inc. v. United States, 883 F.2d 890, 895 n.5 (10th Cir. 1989).

[18] International Shipping, 875 F.2d at 395 (Pratt, J., dissenting).

[19] Stein, *Rule 11 In The Real World: How The Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions For the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 318 (1990)(citing cases).

[20] McGinnis v. Ingram Equip. Co., Inc., 918 F.2d 1491, 1498-1500 (11th Cir. 1990)(en banc)(Hill, J., dissenting); *cf.*, Winstead v. Indiana Ins. Co., 855 F.2d 430, 435 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989)(argument that waiver not applicable because

In 1984, the American Bar Association established an *ad hoc* Commission of Professionalism. Following two years of work, it issued a controversial report[21] advocating, among other things, the increased use of sanctions.[22] The fact that "reviewing courts should provide whatever counterbalance is needed"[23] was deemed sufficient to control abuse by district courts. In *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), however, the Court curtailed stringent appellate review of Rule 11 decisions. One of the practical reasons expressed was that determinations of reasonableness were "unlikely to establish clear guidelines for lower courts; nor will [they] clarify the underlying principles of law."[24]

No one can argue with this proposition. As a result, however, the issue of what is a "reasonable" inquiry boils down to the simple proposition that it is a matter "for the [district] court to determine, and this determination involves matters of judgment and degree."[25] "[I]ndividual notions of good argumentation"[26] are often the key factor triggering a determination that the Rule has been violated. Neither adherence to the American Bar Association's standards and guidelines relating to practice under Rule 11,[27] or use of one of the three major treatises on the subject,[28] will provide assurance that counsel has not "miscalculate[d] ever so slightly the location of" the line drawn between arguments that are "barely nonfrivolous" and those which are

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party feared Rule 11 sanctions rejected).

[21] ABA COMMISSION ON PROFESSIONALISM, . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter BLUEPRINT]. *See also* W. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 11 ("This development of increased use of sanctions is long overdue."). For an articulate response, see Rotunda, *supra* note 4.

[22] BLUEPRINT, *supra* note 21, at 42.

[23] *Id.* at 41.

[24] 110 S. Ct 2447, 2450 (1990).

[25] Burell v. First Nat'l Bank, 831 F.2d 788, 789 (8th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

[26] Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 638 (1987).

[27] ABA, *Standards & Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101 (1988).

[28] *See supra* note 3.

sanctionable.[29] It is no solution to point out that "[u]ncertainty is a fact of legal life"[30] and tell the bar that although "the precise course of the line may be uncertain," a lawyer proceeds at his or her own risk.[31]

With no clear distinction having been drawn between a position which is "merely losing" and that which is both "losing and sanctionable,"[32] Rule 11 is a blueprint for conservatism. The most aggressive advocates of the bar, those having the strength of character and professional acumen to handle cases the risk averse turn away, practice at their own peril.[33] The reality is that lawyers "are in a state of consternation concerning the amended Rule and are at a loss as to how to represent their clients effectively in an atmosphere where an unsuccessful claim may result in ruinous sanctions against them."[34] Capricious application of the Rule, however, is but one part of the problem. The other stems from what can only be labeled as callous insensitivity to creative advocacy by attorneys litigating in good faith.

Every lawyer knows that the "biggest sanction" imposed is being told that you are wrong.[35] As a result of the sanctioning tool, however, courts step beyond the merits to attack lawyers. Characterizations such as beneath the level of "a first year law student,"[36] "wacky"[37] and not of the level to cause the court to

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[29] Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 574 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987). *See also* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1989)("there is good ground for arguing that the standard a court will apply under Rule 11 is unpredictable"); Note, *supra* note 26, at 651 n.101 ("[e]rratic application of Rule 11 threatens to turn it from a constructive principle for caseload management into a random instrument of judicial intimidation").

[30] Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir. 1986).

[31] *Id.*

[32] Securities Indus. Ass'n v. Clarke, 898 F.2d 318, 321 (2nd Cir. 1990).

[33] *See* Nelkin, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation & Punishment*, 74 GEO. L. J. 1313, 1343-44 (1986)(cases resulting in restrictive holdings on merits do not alter alliance between lawyer and client; liability for sanctions inserts ingredient of lawyer's self interest).

[34] Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D. Ky. 1987).

[35] Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 841 (1st Cir. 1990).

[36] Spiller v. Ella Smithers Geriatric Center, 919 F.2d 339, 346 (5th Cir. 1990); Robeson Defense Committee v. Britt, 132 F.R.D. 650, 656 (E.D.N.C. 1989).

[37] Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080; *see also* Federal Sav. & Loan Ins. Corp. v. Molinaro, 923 F.2d 736, 742 (9th Cir. 1991)(O'Scannlain, J.,

"applaud"[38] are not atypical. This is base, mean language by judges whose interest in grinding an institutional ax overrides their responsibilities to the bar. Lawyers whose careers are at stake deserve more than exercises in adjectival flippancy. Pointing out that although "frivolity, like obscenity is . . . difficult to define,"[39] attorneys litigate at their "peril"[40] ignores the fact that lawyers are officers of the court, not members of Two Live Crew.

Lawyers and clients do not need to be told what "wacky" arguments are sanctionable or to have explained why arguments are frivolous. The only purpose served by publishing opinions having no precedential value is to ridicule and inflict unnecessary, devastating professional harm. The long term consequences of breaking a two-hundred year unwritten compact of respect between the bench and bar are ominous.[41] The fact that the Rule turns lawyers against lawyers is enough to warrant condemnation. That it is now used to turn judges against lawyers and lawyers against judges makes it all the more unpalatable.

It is also of no small moment that those "whose research (or resources) are not unlimited or whose skills in argumentation fall short of the most finely honed,"[42] are especially vulnerable. These are the single and small firm practitioners, the only available source of representation for those without substantial means. The consequences to millions of Americans and small businesses whose lawyers are on notice that they may not be "smart enough" or not have enough books or computer research facilities in their offices to represent them in federal court are tragic. Statements like "the generalists acts at his peril,"[43] reflect an elitist arrogance which refuses to accept the fact that

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dissenting).

[38] Gilbert v. Ben-Asher, 900 F.2d 1407, 1411-12 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 177 (1990).

[39] NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987)

[40] Hays v. Sony Corp., 847 F.2d 412, 419 (7th Cir. 1988).

[41] *See* Weinstein, *Reflections on the 1983 Amendments of U.S. Rules of Civil Procedure*, N.Y.L.J., Nov. 14, 1983, at 4, col. 1 (sanctioning will inflict atmosphere of animosity between judges and counsel).

[42] Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part).

[43] *Hays*, 847 F.2d at 419.

this segment of the bar knows wrongs when it sees them and that history proves it is more than competent to prevail in significant litigation.

Discussion of "frivolous" litigation ends where it began. I suggested that the Committee acted precipitously when, without any consideration of the definitional difficulties that were certain to follow, it put in place the "reasonable inquiry" standard. In contrast, there is the work of the New York State Bar Association.

Following amendment of the Uniform Rules for the New York State Trial Courts to sanction attorneys for "frivolous litigation," a Special Committee was commissioned to complete a study on the issue. After soliciting the views of over twelve thousand lawyers and judges and conducting public hearings, it concluded:

> The Committee found no empirical or other data to suggest that the problems confronting the New York State courts are caused by the bringing of frivolous complaints or other pleadings. Rather, almost all indications are that excessive costs and delay are caused by abusive litigation practices. Accordingly, the focus . . . is on abusive conduct, not on the merits of pleadings filed.[44]

The conclusion is identical to that made by Congress in 1980 when, following extensive hearings concerning problems arising from litigation in the federal courts, it amended § 1927 of Title 28 to permit sanctions in the form of fees against counsel engaged in bad faith, vexatious litigation.[45]

(2) The Dynamics of Filed Motions: — It did not take long for the bar, especially those on the defense side, to accept the invitation to file Rule 11 motions. Courts now speak in terms of the "flood,"[46] and the "seemingly inevitable motion for sanctions,"[47] which is filed sometimes in response "to every paper,"[48]

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[44] *Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts* 9 (March 20, 1990).

[45] *See supra* note 6.

[46] Townsend v. Holman Consulting Corp., 881 F.2d 788, 797 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990)(en banc).

[47] Brandt v. Schal Assoc., Inc., 121 F.R.D. 368, 369 (N.D. Ill. 1988).

in a case. The reporter system is inundated with opinions referring to "baseless mudslinging,"[49] the "repeated use of the Rule 11 sanction mechanism,"[50] its use as "a strategic ploy or as a means of reprisal,"[51] and the "excessive amount of time," consumed by a unique form of motion practice which "inevitably seem[s] to invite cross-motions for sanctions."[52] The result: a "well-spring"[53] of satellite litigation where the "sanctions tail is wagging the dog,"[54] or "completely engulfing the original action."[55]

Current "dismay with the excessive amount of time"[56] devoted to the Rule should have been anticipated. There is the fact that "imposition of sanctions in one case may encourage parties to bring motions . . . under rule 11 in other cases."[57] A not discrete segment of the bar "know[s] exactly what is a frivolous claim: it is something they do not do; it is something engaged in by the opposing counsel."[58] There is also the more astute group for whom the motion is a form of "emphatic behavior," designed to influence the judge's decision on the merits with the message that opposing counsel's position "is not only wrong, it is so wrong that it is frivolous and should be sanctioned."[59] There are also those who see the Rule as a weapon of "warfare,"[60] to be employed as a part of "hard ball" litigation techniques,[61] or as an "additional poker chip which allows the

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[48] Vista Mfg., Inc. v. Trac-4, Inc., 131 F.R.D. 134, 145 (N.D. Ind. 1990).

[49] Autrey v. United States, 889 F.2d 973, 986 n.20 (11th Cir. 1989).

[50] Blum, Frank & Kamins Cos., Inc. v. Marzullo, No. 89-345 n.7 (D.D.C. Aug. 15, 1989) (LEXIS), Genfed Library, Dist. file).

[51] Shore v. Freitag Realty, Inc., No. 83 C 2582 (N.D. Ill. October 6, 1987) (LEXIS, Genfed Library, Dist. file).

[52] Eldon Indus., Inc. v. Rubbermaid, Inc., 735 F. Supp. 786, 794 (N.D. Ill. 1990).

[53] Townsend v. Holman Consulting Corp. 881 F.2d 788, 792 (9th Cir. 1989).

[54] Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1330 (9th Cir. 1989)(Schroeder, J., concurring).

[55] TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1188 (7th Cir. 1990).

[56] *Eldon Indus.*, 735 F. Supp. at 794.

[57] International Shipping Co. v. Hydra Offshore, Inc., 675 F. Supp. 146, 154 (S.D.N.Y. 1987).

[58] Rotunda, *supra* note 4, at 1167.

[59] Stein, *supra* note 19, at 315.

[60] Flip-Side Prod., Inc. v. Jam Prod., Ltd., 843 F.2d 1024, 1035 (7th Cir. 1988).

[61] Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

player to stay in the game."[62] Whatever the group in question, it is disingenuous to impute an altruistic motive to any member of the bar who attacks opposing counsel litigating in good faith with the intent to inflict professional and economic harm.[63]

The Committee could not have given any considerable thought to the type of lawyer who would use Rule 11 and the way it would be employed. The "scorched earth" technique for litigation and the fact that the last twenty years has seen a significant degeneration of interpersonal relationships within the bar was then, as now, well known.[64] This fact, coupled with offering an incentive of attorneys fees, has now brought about what should have been obvious at the beginning: "[B]ecause of its susceptibility to misuse as a disingenuous device of obstruction, rule 11 has generated collateral disputes of unprecedented — and perhaps unanticipated — magnitude."[65] Amending the Rule to accomplish the "relatively modest goal of getting lawyers to 'stop and think,' "[66] has proven to be counterproductive. It not only condones preexisting detrimental behavior, it exacerbates the problem by offering yet another means of harassment.[67]

(3) Due Process: — Rule 11 puts in place a "new form of

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[62] Greenberg v. DeTessieres, 902 F.2d 1002, 1005 (D.C. Cir. 1990).

[63] *See* 120 N.J.L.J. 250 (July 30, 1987)(District Judge Dickinson R. Debevoise concluding that attorneys bringing Rule 11 motions are perceived by him as "highly unprofessional"); Weiss, *supra* note 1, at 23 ("I most resent Rule 11 because it pits lawyer against lawyer in a very unseemly way, in the wrong arena, and in a public spectacle.").

[64] *See, e.g.*, Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

[65] Fitzwater, *Toward A Renaissance Of Professionalism in Trial Advocacy*, 20 TEXAS TECH L.J. 787, 800 (1989).

[66] Nelkin, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 31 HASTINGS L.J. 383, 385 (1990) (quoting, A. MILLER, THE AUGUST, 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 15 (Federal Judicial Center 1984)).

[67] As pointed out by Judge Schwarzer in his first article, "an offending party seeking to obstruct and delay litigation may welcome the resulting proliferation of proceedings as serving his purpose." Schwarzer, *Sanctions Under Rule 11 — A Closer Look*, 104 F.R.D. 181, 182 (1985). *Accord* Lerner & Schwartz, *Why Rule 11 Shouldn't be Changed: The Proposed Cure Might Exacerbate the Disease*, NAT'L L.J., May 9, 1983, at 13, col. 1 (Rule conflicts with purpose of Federal Rules "to reduce discovery abuses and abuses of process").

malpractice"[68] in the sense that it generates disciplinary power within the federal court system which has heretofore been the sole dominion of state licensing bodies. Rule 1.1 of the Model Rules of Professional Conduct mandates that "[a] Lawyer shall provide competent representation . . . ." Rule 3.1 further provides that "[a] lawyer shall not bring . . . a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for extension, modification or reversal of existing law." The ABA Model Code contains similar provisions.[69] Only in the rarest of instances, however, have courts adhered to the judicial responsibility to report Rule 11 violations to the appropriate disciplinary board.[70]

The proposition that there is "no more reason for a competent attorney to fear being sanctioned under Rule 11 than to fear being punished for any other form of malpractice,"[71] is simply not true. State disciplinary proceedings are only initiated after investigations by independent bar counsel.[72] In contrast, this malpractice action is brought without the benefit of any prescreening mechanism by an adversary whose motives, in many instances, bear no relation to the Rule's objective. Full due process is also offered by all disciplinary boards. Counsel enmeshed in the Rule 11 quagmire, however, may expect less process than would be necessary to seize a refrigerator.[73]

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[68] *Hays*, 847 F.2d at 419 (Rule 11 is a "new form of legal malpractice").

[69] Canon 6 mandates that a lawyer "shall not . . . [h]andle a legal matter which he knows or should know that he is not competent to handle . . . ." *See also* DR 7-102(A).

[70] MODEL CODE OF JUDICIAL CONDUCT, CANON 3D(2)(1990) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . *shall* inform the appropriate authority) (emphasis added). One leading authority on professional regulation gives the obvious answer. "To date, the enforcement of competence standards has been generally limited to exotic, blatant, or repeated cases of lawyer bungling." C. WOLFRAM, *supra* note 5, at 190.

[71] *Hays*, 847 F.2d at 418.

[72] C. WOLFRAM, *supra* note 5, at 101 ("Most jurisdictions today rely on full-time bar counsel to handle screening and to make decisions about prosecuting complaints.").

[73] Thanks to Judge James Hill, late of the Fifth Circuit, for first making this analysis in another context. *See* Dahl v. Akin, 630 F.2d 277, 279 (5th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *see also* Comment of the Chicago Bar Association 13 (Nov. 2, 1990)(submission to Committee on Rules & Procedure of Judicial Conference of the United States in Response to Call for Written Comments on Rule 11) ("It is astonishing to realize that $500,000 sanctions award is subject to fewer procedural protections than those afforded to a $50,000 diversity action").

Concerns with "satellite litigation" and the perceived need to "streamline" cases result in truncated proceedings. Following notice, counsel is offered the opportunity to respond, a "requirement [that] does not require an elaborate or formal hearing."[74] The simple expedient of providing an opportunity to submit a brief "is usually all that due process requires."[75] Finally, although failure to develop full findings of fact and conclusions of law is a potential ground for reversal,[76] other considerations tend to dilute adherence to the requirement.

Sympathetic appellate panels allude to the proposition that the task "impose[s] upon the district courts [an] onerous and often time-consuming burden.' "[77] There are also the practical consequences of extending satellite litigation with remand orders. The result is a growing body of opinions reviewing orders phrased in "metaphors,"[78] and "oral statements of the district court."[79] Similarly, when the basis for sanctions is "obvious"[80] or may be "inferred" from the record,[81] the district court is relieved of its responsibility to make an appropriate record. There is also an increasing concern by the bar with the presumption of impartiality given the judge and use of the Rule by those who tend to

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[74] Spiller v. Ella Smithers Geriatric Center, 919 F.2d 339, 347 (5th Cir. 1990) (analyzing law of the circuits).

[75] *Id. Contra* Tom Growney Equip. v. Shelley Irrigation Dev., Inc., 834 F.2d 833, 835-36 (9th Cir. 1987)(due process requires an actual hearing).

[76] *E.g.*, Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 195 (1st Cir. 1990); Thomas v. Evans, 880 F.2d 1235, 1240 (11th Cir. 1989)

[77] Lloyd v. Schlag, 884 F.2d 409, 413 (9th Cir. 1989) (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 882-83 (5th Cir. 1988)(en banc)). The approach stands in stark contrast to the protection required when 42 U.S.C. § 1927 was amended in 1980. Congressman Mazzoli summarized the understanding reached by the Senate and House conferees as follows:

> The managers . . . strongly agreed that judges who utilize § 1927 sanctions must make every effort to safeguard the rights of an attorney who may be held in violation of that section. In so doing, it is imperative that the court afford the attorney all appropriate protections of due process available under law.

126 CONG. REC. 23625-26 (1980).

[78] Teamsters Local v. B & M Transit, Inc., 882 F.2d 274, 279-80 (7th Cir. 1989).

[79] Mann v. G & G Mfg., Inc., 900 F.2d 953, 959 (6th Cir.), *cert. denied*, 111 S. Ct. 387 (1990).

[80] *Id.*

[81] Perlman v. Pioneer Ltd. Partnership, 918 F.2d 1244, 1250 (5th Cir. 1990); *Mann*, 900 F.2d at 959.

be "overzealous."[82] Many sanctions are imposed in cases in "which the emotions of not only the parties but the court are . . . involved."[83] From the moment a conclusion is reached with respect to the merits, district judges often become advocates for the position taken. As a matter of psychological reinforcement, there is the real danger that arguments advanced by the losing counsel will be viewed as not only losing but losing and sanctionable.[84] The reality of an increasingly conservative bench also plays a role. Careful screening by the Executive Branch[85] now insures that many judges are philosophically disinclined to accept any arguments relating to the scope of existing law, much less good faith arguments in support of its extension. Therefore, it is not at all surprising that public interest litigation has been especially targeted.[86]

Finally, there are the practical consequences resulting from the filing of a Rule 11 motion. Absent a decision to retain counsel, an attorney must allocate professional time to his own defense. If, as most Rule 11 motions are currently drafted, the role of the client is also at issue, there is a conflict of interest sufficient to require some courts to order disqualification.[87] Even if

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[82] Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part).

[83] Mendenhall, *Ninth Circuit Judicial Conference Report*, 132 F.R.D. 83, 104 (1990).

[84] For a full discussion of this issue, *see* Stein, *supra* note 19.

[85] *See* ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT, YEAR END REPORT (1990).

[86] *See, e.g.*, Blue v. United States, 914 F.2d 525 (4th Cir.), *cert. denied* Chambers v. United States, Dept. of Army, 111 S. Ct. 1580 (1991); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied* Kunstler v. Britt, 111 S. Ct. 1607 (1991); Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990); D'Amato, *The Imposition of Attorney Sanctions For Claims Arising From The U.S. Air Raid On Libya*, 84 A.J.I.L. 705 (1990)(demonstrating that *Saltany* was based on reasonable construction of existing law). The fact that the public interest bar has been especially affected by the Rule is commonly accepted. *See* Note, *A Uniform Methodology For Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public & Private Legal Resources*, 63 S. CAL. L. REV. 1855, 1858 (1990); Tobias, *Rule 11 & Civil Rights Litigation*, 37 BUFFALO L. REV. 485 (1988).

[87] Eastway Const. Co. v. City of New York, 637 F. Supp. 558, 570 (E.D.N.Y. 1986) (when question is whether client or attorney is at fault, interests of two become adverse and client will need new counsel), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); *see also* Perkins v. General Motors Corp., 129 F.R.D. 655, 657 (W.D. Mo. 1990)(client forced to proceed *pro se* in Rule 11 proceedings "because she could not afford to hire a lawyer.")

not ordered, the mere "existence of the sanction threat may interfere with representation on the merits."[88] Although originally perceived as only a "Kafkaesque dream,"[89] there is the increasing tendency to file counter Rule 11 motions.[90] Minimal penalties imposed for those which prove successful, however, do not provide the disincentive necessary to deter abuse of the Rule.

(4) The Appropriate Sanction: — The Supreme Court has now made it clear that the Rule's "central purpose . . . is to *deter* baseless filings."[91] How this objective is to be implemented is another matter. After six years of interpretation, the results are no better than that of the criminal justice system where "[f]or centuries the deterrent effects of punishment have been debated, but the dispute has produced more heat than light."[92]

The proposition that "vagueness in sanctions [is yet another way] to chill rights . . . in the adversarial process,"[93] cannot be disputed. Any system designed to deter must incorporate certainty of punishment and a predictable level of severity to preclude recidivism. Both judges and lawyers now know that Rule 11 does not produce predictable results with respect to violations. Moreover, the search for a "deterrence formula" designed to place attorneys on notice of the consequences of a violation is the equivalent of a physicist's hunt for the quark.

The problem begins and ends with the Committee's decision

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[88] D. Herr, R. Haydock, & J. Stemple, Motion Practice 518-19 (2d Ed. 1991).

[89] Address by Professor Authur Miller, *Annual Judicial Conference Second Judicial Circuit of the United States*, 101 F.R.D. 161, 200 (1983).

[90] *E.g.*, Greenberg v. Hilton Int'l Co., 870 F.2d 926, 933 (2d Cir. 1989)(both sides appeal denial of Rule 11 motions); Robert v. Peat, Marwick, Mitchell & Co., 857 F.2d 646, 654 (9th Cir. 1988)(noting that "Rule 11 drafters' nightmare has become a reality"); Stuart-James Co., Inc. v. Rossini, 736 F. Supp. 800, 801 (N.D. Ill. 1990) ("The defendants, not to be outdone" file a counter Rule 11 motion); Eldon Indus., Inc. v. Rubbermaid, Inc., 735 F. Supp. 786, 794-5 (N.D. Ill. 1990) (defendant's motion for sanctions found to have violated Rule 11); New York State Energy Research & Dev. Auth. v. Nuclear Fuel Serv., Inc., 714 F. Supp. 71, 75 n.9 (W.D. N.Y. 1988) (denying cross-motion for sanctions).

[91] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2454 (1990). If Rule 11 were imposed against judges, the prime candidate would be Judge Posner for his conclusion that "Rule 11 is a fee shifting statute." Hays v. Sony Corp., 847 F.2d 412, 419 (7th Cir. 1988).

[92] M. Ploscowe, Crime & Criminal Law 298 (1939).

[93] LaFrance, *Federal Rule 11 & Public Interest Litigation*, 22 Val. U.L. Rev. 331, 342 (1988).

to offer "a reasonable attorney's fee" as an option. Because of the sheer volume of Rule 11 decisions and the fact that a large percentage remain unreported, it is impossible to determine with any accuracy what percentage of cases are concluded with fees being assessed. There is agreement, however, that this is the tool most often selected.[94] If deterrence is served by putting in place a you-lose-you-pay approach, it is hard to argue with the Eleventh Circuit:

> What sanction could be more appropriate than making the . . . attorney who instituted the patently frivolous lawsuit pay for the expenses that resulted . . .? This is not a "fee shifting" arrangement; rather, it is a means by which to return to the status quo a party which incurred legal expenses as a result of an action . . . which ought never have been filed.[95]

The choice of words is all that matters. Although Rule 11 is not a fee-shifting mechanism, fees awards in that amount do serve to deter. Thus, full fees may be awarded; not as compensation but for deterrence.

Professor Burbank is obviously correct in concluding that "unless [the lawyer] understands that the sanction was tailored to the circumstances of the violation and the sanctioned individual, it may be no deterrent at all, indeed quite the reverse."[96] This fact, coupled with the additional consideration that there is no support for the proposition the Advisory Committee has authority to alter the American Rule,[97] has resulted in additional considerations designed to reduce awards. The invitation for the Rule 11 movant to "run up" exorbitant fees,[98] has been withdrawn. The Rule is now construed to impose two affirmative ob-

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[94] *See generally* Note, *A Uniform Methodology For Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public & Private Legal Resources*, 63 S. CAL. L. REV. 1855 (1990); Nelkin, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation & Punishment*, 74 GEO. L.J. 1313, 1333 (1986)(concluding that some form of attorney's fees is awarded in 96% of cases).

[95] Collins v. Walden, 834 F.2d 961, 966 (11th Cir. 1987).

[96] S. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 43 (American Judicature Society 1989).

[97] *But see supra* note 91.

[98] Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988)(en banc).

ligations: early notice and mitigation.[99] In addition, an award of fees is now limited to those which are, or should have been "attributable to the offensive conduct."[100] To further restrict the possibility of over deterrence, the district courts are also told to employ "the least severe sanction that is adequate to serve the purpose"[101] of the Rule.

As a result of suggestions found in the Advisory Committee Notes,[102] the fact that deterrence may be the *primary* purpose for Rule 11, does not exclude considerations of punishment and compensation. Thus, even if it were possible to quantify with exactness "deterrence," Rule 11 sanctions are skewed by additional considerations which provide the driving force behind a decision to file motions in the first place.

District courts are inundated with voluminous submissions with their inevitable *Hensley v. Eckerhart*,[103] *Johnson v. Georgia Highway Express, Inc.*,[104] appendices explaining the countless hours and exceptional legal talent expended to respond to frivolous claims.[105] The result is the development of new mul-

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[99] *Id.*

[100] Ostano Commerzanstalt v. Telewide Systems, Inc., 880 F.2d 642, 650 (2d Cir. 1989); *see also* Business Guides, Inc v. Chromatic Communications Enter., Inc., 111 S.Ct. 922, 934 (1991) (Rule 11 sanctions do not "shift the entire cost of litigation; they shift the cost of a discrete event").

[101] *E.g.*, *Thomas*, 836 F.2d at 878; Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); Doering v. Union County Bd., 857 F.2d 191, 194 (3d Cir. 1988).

[102] FED. R. CIV. P. 11 (Adivosry Committee Note). The note reads in pertinent part:

> The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees.
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> . . . The word "sanctions" in the caption, for example, stresses a deterrent orientation . . . . The court, however, retains the necessary flexibility to deal appropriately with violations of the rule.

Id.

[103] 461 U.S. 424 (1983).

[104] 488 F.2d 714 (5th Cir. 1974).

[105] *E.g.*, Melrose v. Shearson/American Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990)(six hundred hours and $86,842.15 for responding to frivolous motion for summary judgment); Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1093 (3d Cir. 1988)("[I]t seems paradoxical to award of $20,000 in fees for the defense of a case [that defendant] maintains was so frivolous that it 'crie[d] out for the award of sanctions' ").

tifactor tests[106] which, after having district courts perform the "lodestar" exercise, require inquiry into a kaleidoscope of issues. These include ability to pay, adverse press from the incident, reputation, the movant's need for compensation, degree of frivolousness, the type of litigation involved, presence of harassment and the like. Honest application of the standards is an open issue. The history of attorneys fees litigation is replete with examples of district court decisions by result-oriented judges.[107] The required exercise is also not simple, yet another reason "which may help to explain why so many [judges] have shirked [the] duty,"[108] to closely tailor sanctions awards to the deterrent purpose.

(5) Appeals of Sanction Orders: — In reviewing a ruling that the Rule has been violated, appellate courts apply the abuse of discretion standard.[109] The fact that "the concept of discretion quite naturally fights uniformity,"[110] virtually insures inconsistent results. The District of Columbia Circuit's position is that district judges have "virtually untrammeled" discretion and that they "exercise even more discretion in fixing a Rule 11 sanction than in fixing a reasonable fee award generally . . . ."[111] Other circuits accept the proposition that no single abuse of discretion standard actually exists[112] and that it may range from "minimal review to fairly intensive review . . . ."[113] Therefore, there is a growing line of decisions reversing sanctions which are

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[106] *E.g.*, White v. General Motors Corp., Inc., 908 F.2d 675, 683-85 (9th Cir. 1990); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 197 n.6 (3d Cir. 1988).

[107] *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561 (1986).

[108] Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989).

[109] Cooter & Gell v. Hartmarx Corp, 110 S. Ct 2447, 2458 (1990)("[A]ppellate courts should review all aspects of Rule 11 sanctions under a deferential standard").

[110] 1 S. CHILDRESS & A. DAVIS, STANDARDS OF REVIEW 232 (1986).

[111] Hilton Hotel Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990).

[112] *See*, S. CHILDRESS & A. DAVIS, *supra* note 11, at § 4.1.

[113] Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 940-41 (7th Cir. 1988)(en banc)(Flaum, J., dissenting). *See* In re McLinn, 739 F.2d 1395, 1404 (9th Cir. 1984)(en banc)(Schroeder, J., dissenting)("By giving 'substantial deference,' or . . . 'great insight,' to the decisions of the district courts, appellate courts do not suspend their own thought processes."); Salve Regina College v. Russell, 111 S. Ct. 1217, 1219 (1991) (distinguishing *de novo* review on the basis that it tolerates "no form of appellate deference").

perceived as either too high, too low, or fail to take into consideration all necessary "factors."[114]

The internecine quality of Rule 11 litigation, amorphous objectives of deterrence, compensation and punishment, and the fact that professional reputations are at stake, insure that a significant percentage of sanctioning decisions will continue to be appealed. Telling the bar that appellate courts should be freed from the "duty of reweighing"[115] factors already considered by the district courts and that the abuse of discretion standard of review is to be employed is one thing. Assuming this will "discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation,"[116] is another.

Studies

Additional threads in the Rule 11 fabric are various "studies" designed to provide information on the positive and negative impact of the Rule. The earliest work was performed by Professor Vairo. Compiling data derived from reported decisions, she developed a circuit-by-circuit analysis on numbers of cases, subject matter and disposition.[117] Professor Burbank, in his capacity as Reporter for the Third Circuit Task Force on Rule 11, gathered data from all district courts in the circuit in order to "identify, track, and report on each Rule 11 motion filed . . . and each action taken by a judge . . . during the survey period."[118] In addition to interviewing attorneys involved in Rule 11 proceedings, questionnaires were mailed to magistrates, district judges and those "identified as having an active practice in federal court."[119] Professor Nelkin also employed the data gathering/survey technique for an in-depth analysis of the Rule as it impacts on practice in the Northern District of California.[120] In February of 1991, the Research Division of the Federal

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[114] *See generally supra* note 94.

[115] *Cooter & Gell*, 110 S. Ct. at 2451.

[116] *Id.*

[117] *See* G. Vairo, *supra* note 3, at Appendix G (statistical totals as of December 14, 1987).

[118] S. Burbank, *supra* note 96, at 107.

[119] *Id.* at 147.

[120] *See* Nelkin, *The Impact of Federal Rule 11 on Lawyers & Judges in the North-*

Judicial Center reported the results of Rule 11 activity based on a review of court files in five judicial districts[121] and questionnaires sent to over seven hundred district judges.[122] Currently underway is a major project sponsored by the American Judicature Society designed to study the impact of the Rule in the Fifth, Seventh and Ninth Circuits.[123]

Interpretations to be given statistical data, and their bearing on the future of the Rule, I leave for others. The weight given responses to questionnaires is another matter. Ask about other Rules of Civil Procedure and, for the most part, one receives constructive commentary on issues of simplicity, expediency and predictability of outcome. The mere mention of Rule 11, however, generates responses based on subjective perceptions of access to the federal courts and their proper role.[124] Deterioration of professional relationships, the fact that state bars have not fulfilled their responsibility to police the profession, and the reality that there are lawyers practicing at a marginal level of competence, are also important factors to those who see the Rule as an appropriate vehicle to cure systemic problems. The fact that all the foregoing are unrelated to the "relatively mod-

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ern District of California, 74 JUDICATURE 147 (1990).

[121] E. WIGGINS & T. WILGING, RULE 11, JUDGE SURVEY 7 FIELD SURVEY (1991)(Preliminary Report on Judges' Responses to a Questionaire on Rule 11)(unpublished)[hereinafter SURVEY]. Included were the District of Arizona, the District of the District of Columbia, the Northern District of Georgia, the Eastern District of Michigan, and the Western District of Texas.

[122] Of the seven hundred and fifty one which were distributed, five hundred and eighty three responses were received. *Id.* at 1 (preliminary Report on Judges' Responses to a Questionnaire on Rule 11).

[123] In addition to the author, the advisory board for the project is composed of Benjamin Civiletti, Guy Zoghby, Professor Melissa Nelkin, Professor Paul Carrington, Dean Daniel Bernstine, Judge Robert Peckham and Judge Sam Johnson. It is chaired by Professor Leo Levin.

[124] A prime example of the phenomena of personal views impacting directly on the issue of what is and what is not "frivolous" is provided by Chief Justice Burger. Arguing that a First Amendment issue warranting *en banc* consideration by the District of Columbia Court of Appeals and plenary review by the Supreme Court was "frivolous," he complained that it typified the type of litigation which "delay[s] [hearing] the causes of litigants who have legitimate . . . claims." Clark v. Community For Creative Non-Violence, 468 U.S. 288, 301 (1984) (Burger, C.J., concurring). *Cf.* Kennedy, *Form & Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976)("[O]fficial arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule. These range from corruption to political bias").

est goal of getting lawyers to 'stop and think,' "[125] is irrelevant.

A primary example of the suspect credibility of results compiled from questionnaires is the recent survey of district judges conducted by the Federal Judicial Center. Less than four percent believe that "frivolous" litigation is a problem that warrants serious concern.[126] Forty-two percent also conclude that the four percent "problem" has remained unchanged since 1983 while another 41.4% concluded that it has only gotten "slightly better or better."[127] Eighty percent, however, indicated that the Rule should be retained in its present form.[128]

Finally, while not falling within the framework of a formalized survey, the "Call for Written Comments on Rule 11,"[129] by the Rules Committee deserves mention. The result is a formidable stack of memoranda and letters setting forth everything from anecdotal information to the views of various umbrella organizations representing the positions of their constituents. The

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[125] Nelkin, *supra* note 66, at 385; *see also* COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE & RELATED RULES 3 (August 1990)[hereinafter CALL FOR WRITTEN COMMENTS].

[126] Broken into categories, 9.9% concluded that frivolous litigation was no problem, 64.6% said it was "small" or "very small," 21.6% said "moderate," and only 3.8% concluded that it presented a "large and very large" issue. SURVEY, *supra* note 121, at 2.

[127] *Id.* at 4.

[128] *Id.* at 15.

[129] To assist those responding, the Committee postulated ten issues for discussion. Briefly, they included:

(1) Has the Rule discouraged unwarranted expense, delay and other burdens on opposing parties and the courts?

(2) Has the cost of satellite litigation exceeded benefits?

(3) What is the impact of the Rule on civility of litigation?

(4) What evidence is there that the rule has been administered unfairly on any particular group of lawyers or parties?

(5) Even if the Rule as administered even-handedly, is there still a risk of unfairness to certain groups?

(6) Is there a problem of "over-deterrence" as the term relates to the size of sanction awards?

(7) Is there a proper time or occasion that could be specified for the consideration of the sanctions issue?

(8) What other procedural modifications should be made?

(9) Should sanctions be mandatory or discretionary?

(10) What is the relationship between Rule 11 and other sanctioning provisions?

See CALL FOR WRITTEN COMMENTS, *supra* note 125, at 2-7.

latter serve only to confirm what has been obvious from the outset: the Rule divides the plaintiff and defense bars almost as cleanly as the public interest bar and its conservative counterparts.[130]

CONCLUSION

With the leadership of Professor Carrington, the Rules Committee has proven receptive to arguments that the amended Rule has systemic problems. Presuming a decision to change the Rule from its present form, there are a plethora of suggested alternatives.[131] In addition to recommending return to its origi-

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[130] Those filing against the Rule include:
National Employment Lawyers Association
Chicago Council of Lawyers
Chicago Bar Association
Certain members of the ABA Section of Litigation
Commercial & Federal Litigation Section of the New York Bar Association
American College of Trial Lawyers
Federal Courts Subcommittee on Comments to Rule 11, Association of the Bar of the City of New York
ACLU
NALDA
NAACP
Alliance For Justice
Lawyers Committee For Civil Rights Under Law
Legal Services For the Poor Committee, Los Angeles County Bar Association
Evansville Bar Association
Christic Institute South
Public Citizen Litigation Group
Association of Trial Lawyers of America
National Bar Association
Board of Trustees of the Los Angeles County Bar Association
Center for Constitutional Rights
Those for retention in its present form:
American Insurance Association
Washington Legal Foundation
Judicial Studies Program, Manhattan Institute of Policy Research
Litigation Committee of the American Bar Association Young Lawyers Division
Lawyers for Civil Justice (coalition of defense bar organizations and corporate counsel)
Product Liability Advisory Council
Nashville Bar Association

[131] In addition to those now commented on, many submissions made to the Committee in response to its "Call for Comments" incorporated suggestions for change. For in-

nal form, the "most frequent" recommendation by district judges opposed to the Rule is to phrase it in permissive rather than mandatory terms.[132] Other suggestions by this group include placing a cap on the amount of the sanction, clarifying the duty to withdraw pleadings upon later knowledge, requiring a hearing, leave of court to file a motion, and findings and conclusions in support of an order for sanctions.[133]

Greg Joseph, after noting that "[t]here is a strong case to be made that Rule 11 should be abolished,"[134] suggests discretionary sanctions initiated by motion practice.[135] He would also replace the "reasonable inquiry" standard with making sanctionable only those papers "lacking any basis in fact or law or unsupported by a colorable argument for a change in the law."[136] On the other hand, Professor Nelkin adopts the position of the Third Circuit Task Force[137] and would substitute the current standard for one that would require an objective determination of whether there was a "reasonable prefiling inquiry into the facts and law" prior to filing.[138] Her amendment also deletes reference to fees as an appropriate sanction. In lieu thereof, and in order to avoid "routine award of fees," she suggests that the Advisory Committee Note be modified to make clear that the purpose of the Rule is educational and rehabilitative and that courts are to impose the "least severe sanction appropriate" to attain these goals.[139]

My most serious concern is the impact of the Rule on good faith litigation and the wrong case, wrong lawyer, wrong judge phenomena. Therefore, any amendment that does not severely

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stance, the American College of Trial Lawyers suggested making sanctions discretionary, deleting reference to fees and expanding procedural protection. Letter and attachments from Francis H. Fox, American College of Trial Lawyers, to James E, Macklin, Jr., Secretary of the Judicial Conference of the United States (Oct. 26, 1990).

[132] E. WIGGINS & T. WILGING, *supra* note 121, at 15.

[133] *Id.* at 16.

[134] Joseph, *Redrafting Rule 11*, NAT'L L.J. Oct. 1, 1990, at 1.

[135] *Id.*

[136] *Id.* at 14.

[137] S. BURBANK, *supra* note 96, at 14-25. For initial development of this approach see Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

[138] Nelkin, *supra* note 66, at 407.

[139] *Id.*

limit the present scope of the Rule and the potentials for its use, I find objectionable.[140] Also of no small moment is the fact that the basic assumption of the Rule that "frivolous" litigation is a significant problem, is incorrect.[141] This proposition supports the conclusion that the Rule should be returned to its original form.[142] For those who are concerned that this would send a "wrong signal" to the practicing bar, the decision must be accompanied by the completion of a task which should have been undertaken years ago: review of the current quagmire of existing sanctioning provisions[143] and the development of clear, non-overlapping criteria easily understood by the bar and bench.

I placed faith in the proposition that a sensitive, pragmatic judiciary would build on Judge Johnson's opinion in *Thomas v. Capital Securities*. In the wake of over three thousand decisions,[144] however, it is clear that the literal language of the Rule defies a construction that will minimize abuse. The Rules Committee has an obligation to rectify the mistake made in 1983. In doing so, it must insure that no member of the bar will ever again practice law in a demeaning, coercive environment which

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[140] Ridding the Rule of any potential for fee shifting is also a necessary component of any sensible change. The issue of due process and the high stakes at issue when sanctions are employed also warrant the same approach taken by Congress. *See supra* note 77 (agreement by House and Senate managers of bill amending § 1927 that judges must "make every effort to safeguard" rights of attorneys and offer "all appropriate protection of due process . . . .").

[141] *See supra* notes 44 and 126.

[142] Presuming an institutional inability to admit error, the Committee must confront the fact that the capricious results flowing from the current "reasonable inquiry" standard can no longer be tolerated. Although the standard developed by Greg Joseph is much clearer, *supra* note 136 and accompanying text, it falls far short of that suggested by Judge Easterbrook:

> [S]omething is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 out of 100 practicing lawyers would be 99 percent sure that the position is untenable, and the other 1 percent would be 60 percent sure it's untenable. Either one is a pretty stiff test.

Rotunda, *The Litigator's Responsibility*, 25 TRIAL 98, 100 (1989)(quoting letter from Judge Easterbrook to Professor Sanford Levinson (Jan. 29, 1986), quoted with permission in Levinson, *Frivolous Cases: Do Lawyers Know Anything At All?* 24 OSGOOD HALL L.J. 353, 375 (1987)).

[143] *See* MANUAL FOR COMPLEX LITIGATION, SECOND § 42.5 (2d ed. 1986)(listing fifty-seven separate sources for sanctioning in civil proceedings).

[144] Joseph, *Supreme Court Shapes Rule 11*, 26 TRIAL 65 (1990).

permits a district judge to impose devastating professional consequences on lawyers honestly advocating the position of their clients.

BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11

Submitted by:

Judge A. Leon Higginbotham, Jr., Third Circuit Court of Appeals
Judge Patrick Higginbotham, Fifth Circuit Court of Appeals
Judge Mary M. Schroeder, Ninth Circuit Court of Appeals
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Bench-Bar Proposal to Revise Civil Procedure Rule 11

The following statement is the submission to the Standing Committee on Procedure of the Judicial Conference of the United States by those whose names are appended.

* * * * * * *

The proposed revisions to Rule 11 as proposed by the Advisory Committee on Civil Rules makes a very bad matter much worse than it was before. While some of us would repeal the Rule, all think it can be improved and this is an effort to do so.

1. The proposal now made is that we can have a sanctions controversy over every claim, every defense, every request, every demand, every objection, every contention and every argument. The change requires that we must certify whether we are seeking to extend, to modify or to reverse existing law or whether we are seeking to establish new law. This multiples the points of agitation infinitely. The proposed Rule in this report would reverse *Golden Eagle*, 801 F.2d 1531 (9th Cir. 1986), repeatedly,

and almost unanimously followed, and cited more than 150 times.

2. The proposal, as amplified in the note, that if a person has pleaded a denial of some allegation and that if after discovery it appears that denial is no longer warranted the party must replead or face sanctions, turns a law suit not into a prospective search for the truth but into a retroactive exercise in perfecting pleadings. A more extreme device to undo notice pleading would be hard to imagine.

3. The business of (a) endless amplification of the grounds for sanctions; and (b) endless correspondence of the "you did it" and "no I didn't" variety adds enormously to the cost of litigation. These letters and answers must be responsible. Each one of them is good for five-tenths of an hour minimum; some will be more. From the cost end, we should not turn the legal system into a correspondence school. From the standpoint of one of the unhappiest aspects of Rule 11, the decrease of civility within the profession, the proposal accentuates the deterioration of professional relations. The adverse effect of Rule 11 on lawyer relations is expressly confirmed by the recent Seventh Circuit study on civility.

We are drowning in Rule 11 satellite litigation now. Once we start litigating whether par. 3 of the complaint should have been amended because of the answer of X at p. 1352, 1.6, of the deposition, or whether part IV B of the motion for summary judgment was to change or extend existing law, we will never find court time to try a case.

The proposed Rule should not be accepted. We tender the attached proposal from the named judges and lawyers.

The three sponsoring judges are Judge A. Leon Higginbotham, Jr. of the Third Circuit Court of Appeals, Judge Patrick Higginbotham of the Fifth Circuit Court of Appeals, and Judge Mary Schroeder of the Ninth Circuit Court of Appeals. Hugh R. Jones of Syracuse, formerly of the New York Court of Appeals and now in private practice, headed the New York State Bar Committee study of the sanctions problem. The other attorneys are Mr. Jerold S. Solovy and Ms. Laura Kaster of Chicago, active particularly in this connection with the Litigation Section of the American Bar Association; Mr. Bill Wagner of Tampa, Flor-

ida, 1988-89 President of the American Trial Lawyers Association; Professor George C. Cochran, head of the Rule 11 project sponsored by the Center for Constitutional Rights; Mr. Francis Fox of Boston, Chairman of the Committee on the Federal Rules of Civil Procedure of the American College of Trial Lawyers; and Mr. John P. Frank of Phoenix, Arizona, from 1960 to 1970 a member of the Advisory Committee.

BENCH-BAR PROPOSED CIVIL PROCEDURE RULE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

(1) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign similarly and give the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the nonsigner.

(2) The signature of an attorney or party constitutes a certificate by the signer than the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the paper taken as a whole is well grounded in fact and law, including non-frivolous arguments for possible change of law, and that it is not interposed for any improper purpose such as harassment, delay, or needless increase in the cost of litigation.

(3) If a court upon motion or on its own initiative concludes that a pleading, motion or other paper was signed in violation of this rule it may order as a sanction that the person who signed the paper or that person's firm, a represented party, or both, shall pay an appropriate sum into the registry account of the clerk of the district court. The sanction shall be limited to what is sufficient to deter comparable conduct by persons similarly situated. The represented party shall be liable only if the court concludes that the paper was filed to cause harassment, delay or

needless cost increase.

(4) No sanction shall issue until the attorney or party who may be sanctioned has been given notice based upon a precisely stated alleged violation of the rule and has had the opportunity to be heard either orally or in writing. Any sanctions shall be based on written findings of fact and conclusions of law, which shall consider the duty violated; the actual injury caused; and the existence of aggravating or mitigating circumstances.

COMMENT ON BENCH-BAR PROPOSED CIVIL PROCEDURE RULE 11

Rule 11 is one of several devices in the procedural system for controlling abusive conduct by lawyers. As the Supreme Court has recently told us, there is inherent power to deal with gross out-of-court abusive conduct, *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991). Rule 37 deals with discovery abuse, 28 U.S.C. § 1927 with reasonable and vexatious litigation, and Rule 16 provides speedy means to rid cases of frivolous positions. Rule 11 is confined to filed writings.

In short, Rule 11 has a particular and precise niche to fill. Large segments of the bar have felt that despite the usefulness of the Rule 11 concept, severe abuses have crept into its application. To name major concerns, there has been too much costly satellite litigation over the application of the rule; if the cost (time and dollars) of the court system is the patient, Rule 11 as an operation is a success but the patient is dying. "Rule 11 has caused unnecessary satellite litigation . . . a legitimate question is whether the federal courts need Rule 11 at all," *Sanctions, Rule 11 and Other Powers*, Sec. Litig., ABA, 2d ed. 1988.

By scrutinizing the minor details of cases for possible sanctions instead of focusing on big picture abuse, the practical operation has created a Rule 11 industry instead of an occasional needed corrective. A Shepard's Rule 11 service, reporting 1000 reported Rule 11 cases, has recently come on the market. The rule has "assumed a life of its own - spawned a body of substantive law and itself become a means of abuse," J. Coe, *Rule 11 Now*, 17 LITIGATION 10 (1991). The lack of clear procedures permits occasional uninformed arrogance. The premium put on charge and counter-charge takes the focus off trying a case and

puts it on trying the lawyers. The result is a depressing increase in the incivility of the bar, a major problem; for illustrations, see the recent Seventh Circuit study noted in the July, 1991 ABAJ at 22.

This Rule 11 proposal seeks to keep its virtues and eliminate the vices. The proposal draws generally on many sources but particularly the article by George Cochran, *Rule 11: The Road to Amendment*, 61 Miss. L.J. 5 (1991); and J. Solovy, L. Kaster, J. Thompson, and N. Hirsch, Sanctions in Federal Litigation (1991). The draft is paragraphed so that the comment following can relate directly to the precise points of the Advisory Committee's proposed rule.

(a) This paragraph is essentially what is in the existing rule, slightly condensed.

(b) A comprehensive survey of Rule 11 and related problems of frivolous pleadings is the 1990 study of the New York State Bar Association special committee, endorsed by the House of Delegates of the New York State Bar Association on April 7, 1990; the resulting proposed rule is directed at "abusive conduct." That concept, though not the words, is a source of this draft. The proposed rule conforms to the definition and criteria of a leading Rule 11 case, *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986).

This sanction keeps the essence of the existing language with an important clarification: For sanction purposes, the paper is to be evaluated as a whole; *see Golden Eagle Distrib. Co. v. Burroughs*, 801 F.2d 1531, 1540 (9th Cir. 1986). The goal is to escape the practice of analyzing this word or that, this line or that, this subsection or that. If the paper as a whole reflects reasonable inquiry and reasonable presentation of law or a non-frivolous proposal for change of law, it will meet the requirement; litigation which takes the form of parsing of fragments of the composition is intended to be eliminated. Sanctions for proposed changes of law are limited to proposals which are frivolous. This is taken from the recommendation of the Advisory Committee on Civil Procedure, par. (b)(2). On what is "frivolous," *see* quotations from Judge Frank Easterbrook, Rotunda, *The Litigator's Responsibility*, March, 1989, *Trial*, 98, 100, and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir.

1988). The fact that a Federal Judicial Center study shows judges almost evenly divided as to whether a given complaint is frivolous is evidence of a need to reduce such decisions; *see* J.M. Kassin, *An Empirical Study of Rule 11 Sanctions*, 26 (Fed. Jud. Center, 1985); and for more recent illustration of these problems, *see* M. Stein, *Rule 11 in the Real World*, 132 F.R.D. 309 (1990).

(c) This unit changes the sanction from mandatory to permissive, giving discretion to the court. This concept is taken directly from the proposal of the American College of Trial Lawyers, as is the provision that any amounts levied as sanctions shall be paid to the court. For a thoroughly documented study leading to the conclusion that changing the focus of the rule from fee shifting to deterrence would decrease satellite litigation, *see* G. Vairo, *Rule 11, A Critical Analysis*, 118 F.R.D. 189, 233 (1988). A major purpose of this change is to reduce the elements of lawyers fighting with each other for personal gain.

The procedural requirements are also, in slightly condensed form, taken from the American College proposal. A primary scholar on the rule has stressed that permissive language would bring Rule 11 into accord with the well established sanctions standards of Rule 37, M. Nelken, *Sanctions Under Rule 11*, 74 GEO. L.J. 1313, 1353 (1986). The provision permitting sanction of the firm rather than the individual will give the court discretion, particularly where young attorneys are in fact directed by others, to consider where responsibility lies.

Since *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), decided that appellate review is limited to abuse of discretion, it is particularly important that there be clear notice, some opportunity for at least simple hearing, and some explicitness for the ground of the sanction.

The limitation on sanctions on the represented party is taken from the recommendation of the Advisory Committee on Civil Procedure, par. (c). The limitation on sanctions to deterrence is suggested by that same paragraph. This accords with the cases proposing the least severe sanctions to serve the purposes of the rule, *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d

866, 878 (5th Cir. 1988); and *see Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987); *Doering v. Union County Bd.*, 857 F.2d 191, 194 (3d Cir. 1988).

THE LEAST SEVERE SANCTION ADEQUATE: REVERSING THE TREND IN RULE 11 SANCTIONS*

*Judge Sam D. Johnson***
*Byron C. Keeling****
*Thomas M. Contois*****

Perhaps more than any other Federal Rule of Civil Procedure, Rule 11 has provoked widespread criticism and controversy.[1] As amended in 1983, Rule 11 provides that federal district courts[2] must impose "appropriate" sanctions against individuals who sign frivolous motions and pleadings.[3] The district courts have embraced Rule 11 as a convenient method to force individuals who sponsor frivolous litigation to pay the trial expenses and attorneys' fees of their opponents. The targets of these monetary sanctions have complained, with no little justification, that the district courts have applied Rule 11 unfairly and inconsistently.

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* This article is an excerpt from a more comprehensive article, addressing additional Rule 11 concerns, that the authors are preparing for publication in the Baylor Law Review. The complete version will appear in the Fall edition of Volume 43 of the Baylor Law Review. The authors would like to thank the Baylor Law Review for its gracious permission to allow this excerpt to be published here. Once the complete version appears in the Baylor Law Review, interested individuals should consult the Baylor version and make formal citation to that version.

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[1] *See* Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5 (1991).

[2] Rule 11 permits sanctions based on activities that occur on the *trial* level. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990). Rule 11 sanctions, therefore, are available to magistrate judges and bankruptcy judges, as well as district judges. For convenience, this article uses the term "district court" to refer to all trial level judges.

[3] FED. R. CIV. P. 11.

A federal court rules advisory committee, responding to the controversy surrounding Rule 11, has recently proposed amendments to Rule 11. The advisory committee has recommended, among other things, that Rule 11 should encourage alternatives to monetary sanctions.[4] This recommendation would, in substance, codify the current judicial interpretation of Rule 11: the federal appellate courts have uniformly concluded that the district courts should apply the "least severe sanction adequate" to accomplish the purposes of Rule 11. Unfortunately, the federal district courts have not strictly adhered to this rule, and the appellate courts have not vigorously enforced it. This article examines the deterioration of the concept of the "least severe sanction adequate" and the changes necessary to restore it to Rule 11 practice.

I. The Present State of Rule 11 Law: The Deterioration of the Doctrine of the Least Severe Sanction Adequate

The district courts, under the current interpretation of Rule 11, have broad discretion to fashion an appropriate sanction against individuals who sign frivolous motions or pleadings.[5] Most federal appellate courts have cautioned, however, that the district courts, if they must impose sanctions, should impose the least severe sanction adequate to serve the purposes of Rule 11.[6] This "least severe sanction adequate" requirement, first applied to Rule 11 in an article authored by Judge William W. Schwarzer,[7] implies that district courts should consider less severe alternatives to monetary sanctions. Regrettably, this requirement is all too often ignored and, moreover, has been so eroded that it has little practical effect.

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[4] *Court Panel Recommends Rule 11 Alterations*, Nat'l L.J., May 27, 1991, at 6.

[5] *See* Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (en banc); Cabel v. Petty, 810 F.2d 463, 466 (4th Cir. 1987).

[6] *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990); Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990); Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989); *Doering*, 857 F.2d at 194; *Thomas*, 836 F.2d at 878; Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987); *Cabell*, 810 F.2d at 466.

[7] Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985)("The basic principle governing the choice of sanctions is that the last severe sanctions adequate to serve the purpose should be imposed.").

A. *Alternatives to Monetary Sanctions*

The United States Supreme Court, in *Cooter & Gell v. Hartmarx Corp.*,[8] recognized that the main objective of the Rule is not to compensate or reward the prevailing parties in litigation; it is, instead, to "deter baseless filings and curb abuses."[9] Therefore, at least according to the Supreme Court, Rule 11 is not a fee shifting statute.[10] The Rule requires that a court impose an "appropriate sanction" against an individual who has signed a frivolous motion or pleading,[11] but an appropriate sanction *need not necessarily include* an award of attorneys' fees.[12]

Nonetheless, while Rule 11 is not a fee shifting statute, the district courts, for all practical purposes, have treated it as such. Many district courts assume that sanctions should "return to the status quo to the party which incurred legal expenses as a result of an action or motion which ought never have been filed."[13] Accordingly, in the vast majority of cases involving Rule 11 sanctions, the district courts have assessed an award of attorneys' fees against the sanctioned party.[14]

The federal circuit courts have cautioned the district courts that attorneys' fees awards are not the sole available Rule 11 sanction. The circuits have recognized, for example, that a district court in its discretion may award a smaller monetary sanc-

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[8] 110 S. Ct. 2447 (1990).

[9] Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922, 934 (1991).

[10] *See Cooter & Gell*, 110 S. Ct. at 2462; Giardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

[11] FED. R. CIV. P. 11.

[12] *Cooter & Gell*, 110 S. Ct. at 2462 ("A movant under Rule 11 has no entitlement to fees or any other sanction. . . ."). *See also Business Guides, Inc.*, 111 S. Ct. at 934 ("the Rule calls only for 'an appropriate sanction' — attorneys' fees are not mandated."); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988)("The language of Rule 11 evidences the critical role of judicial discretion, stating that when the district court determines that a filing is in violation of the rule, the court 'shall' impose sanctions that 'may' — not 'shall'—'include an order to pay' the other party's expenses").

[13] Collins v. Walden, 834 F.2d 961, 966 (11th Cir. 1987).

[14] *See* Nelkin, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation & Punishment*, 74 GEO. L.J. 1313, 1333 (1986)(concluding that some form of attorneys' fees is awarded in 96% of cases in which Rule 11 sanctions are imposed).

tion than an award of actual attorneys' fees.[15] In addition, the circuits have approved the use of alternatives to monetary sanctions. In *Thomas v. Capital Sec. Services, Inc.*,[16] for example, the United States Court of Appeals for the Fifth Circuit recognized a variety of alternative sanctions available to district courts. The court of appeals concluded that an appropriate sanction under Rule 11 could include "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, . . . or other measures appropriate to the circumstances."[17]

Formal reprimands, in particular, are a viable alternative to monetary sanctions. A formal reprimand in open court deters future frivolous motions and pleadings, and at the same time, educates the sanctioned individual in substantive and procedural law. However, a reprimand does not exact a severe monetary penalty that might stifle the creative efforts of attorneys and litigants.[18] In short, the reprimand is an ideal sanction against an individual who commits a relatively mild violation of Rule 11 or a first time transgression.[19]

Ideal or not, though, the district courts have rarely used

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[15] *See* Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1230 (6th Cir. 1989)("even when the offended party's actual expenditures appear reasonable, a district court may determine in its discretion that a smaller amount should be awarded as a sanction. . . ."); Stewart v. American Int'l Oil & Gas Co., 845 F.2d 196, 202 (9th Cir. 1988); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986)("the court may decide that the circumstances warrant imposition of only part of the adversary's expenses. . . ."). Such an award often is sufficient to deter a sanctioned party from further abuses. *See Stewart*, 845 F.2d at 202. For examples of cases in which district courts reduced an award of attorneys' fees because a reduced award would adequately serve the purposes of Rule 11, see Arco v. Travelers Ins. Co., 730 F. Supp. 59, 70 (W.D. Mich. 1989); Cedar Crest Health Center, Inc. v. Bowen, 129 F.R.D. 519, 527 (S.D. Ind. 1989).

[16] 836 F.2d 866 (5th Cir. 1988) (en banc).

[17] *Id.* at 878.

[18] This is not to suggest that a reprimand is a convenient escape from the mandatory nature of Rule 11 sanctions — a "sanction, but not really a sanction." A formal reprimand can be a severe, and even debilitating, sanction. *See* Schwarzer, *supra* note 7, at 201-02 ("Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer's reputation and career."). Accordingly, the circuit courts have encouraged the district courts to fashion their criticism from the bench to ensure that it is commensurate with the violation. *See Thomas*, 836 F.2d at 878.

[19] Schwarzer, *supra* note 7, at 201.

reprimands as Rule 11 sanctions.[20] For that matter, the district courts have shown little inclination to impose any sanction that does not strike the sanctioned litigants in the pocketbook. Thus, many courts have assumed, *without consideration of alternative sanctions*, that the least sanction adequate to serve the purposes of Rule 11 is a monetary sanction.[21] Such a cursory analysis begs the question. Certainly, a formal reprimand may not serve the purposes of Rule 11 in all cases.[22] Even in these cases, however, an award of attorneys' fees is not necessarily the least sanction adequate to deter abuse of the judicial process.

The circuit courts, despite their articulation of the least severe sanction adequate concept, have done little to encourage the district courts to adopt a more accommodating view toward alternative sanctions. In one unsettling example of the appellate courts' deference to the district courts, the Fifth Circuit suggested that district courts need not even consider alternative sanctions that a party has not requested.[23] This reasoning illustrates the irony in the present formulation of Rule 11: while the appellate courts have commented that district courts should impose the least severe sanction adequate to serve the purposes of the rule, in practice the appellate courts have given the district courts little incentive to assess nonmonetary sanctions. As a consequence, the concept of the least severe sanction adequate continues to deteriorate.

B. Factual Findings

The circuit courts are not insensitive to the fact that the district courts in large part ignore the least severe sanction adequate concept. Many of the federal appellate courts, recognizing that the district courts generally will assess monetary sanctions,

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[20] For examples of cases in which the district court used reprimands as Rule 11 sanctions, see Traina v. United States, 911 F.2d 1155, 1158 (5th Cir. 1990); Atkins v. Marathon LeTourneau Co., 130 F.R.D. 625, 627 (S.D. Miss. 1990); American State Bank v. Pace, 124 F.R.D. 641, 649 (D. Neb. 1988); Propst v. Greene, 123 F.R.D. 535, 543 (W.D.N.C. 1988).

[21] *See, e.g.*, Lockette v. American Broadcasting Co., 118 F.R.D. 88, 91-92 (N.D. Ill. 1987); Pfeifer v. Valukas, 117 F.R.D. 420, 424 (N.D. Ill. 1987).

[22] *See* Harmony Drilling Co. v. Kreutter, 847 F.2d 17, 19 (5th Cir. 1988).

[23] Port Drum Co. v. Umphery, 852 F.2d 148, 151 (5th Cir. 1988).

have required in certain cases that district courts enter specific factual findings that support the sanctions they imposed.[24] The Tenth Circuit, for example, has required factual findings in all cases in which the district courts assess monetary sanctions.[25] This is an unambiguous standard: if a district court intends to impose monetary sanctions, it must explain the basis for its conclusion that monetary sanctions are the least severe sanction adequate.

Other circuits have been less clear. The Seventh Circuit ruled in *Brown v. Federation of State Medical Boards*[26] that the district courts must state the reasons for the imposition of a particular sanction "in cases involving substantial awards."[27] The Fifth Circuit in *Thomas* adopted a sliding scale analysis: "the degree and extent to which a specific explanation must be contained in the record will vary accordingly with the particular circumstances of the case, including the severity of the violation, the significance of the sanctions, and the effect of the award."[28]

The standards in *Brown* and *Thomas* reflected a laudable attitude of deference to the district courts. The Seventh and Fifth Circuits declined to impose additional Rule 11 requirements on the district courts because they concluded, based on a sympathetic understanding of the backlog on district court dockets, that these courts were better equipped to determine for themselves when factual findings were necessary. At the time,

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[24] *See In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990); White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990); *see also* Eastway Const. Corp. v. City of New York, 637 F. Supp. 558, 571 (E.D.N.Y. 1986), *aff'd as modified*, 821 F.2d 121 (2d Cir. 1987).

[25] White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990). The Tenth Circuit ruled that district courts, in cases in which they assess monetary sanctions under Rule 11, must enter specific factual findings on three factors: (1) whether the amount of the sanction is reasonable; (2) whether the sanction is the minimum necessary to adequately deter the undesirable behavior; and (3) whether the sanctioned individual has the ability to pay the sanction. *Id.* at 684-85. In addition, the *White* court emphasized that district courts should consider other factors that may arise under the circumstances, including "the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, [and] the risk of chilling the type of litigation involved." *Id.* at 685.

[26] 830 F.2d 1429 (7th Cir. 1987).

[27] *Id.* at 1438.

[28] Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc).

this resolution appeared to remove from the district courts the onerous burden to draft factual findings in very Rule 11 case. It is now apparent, however, that the district courts have taken unintended advantage of the permissive nature of the *Brown* and *Thomas* standards.

After *Brown* and *Thomas*, district courts in the Seventh and Fifth Circuit have often refused to enter specific factual findings, even in cases involving large monetary sanctions. The appellate courts, notwithstanding the absence of findings to guide their review, have affirmed these sanctions.[29] Thus, at least in some circuits, the current scheme has proven unworkable: while the appellate courts agree that the district courts should impose the least sanction adequate to serve the purposes of Rule 11, the district courts can effectively sidestep this requirement. A district court can impose a large monetary sanction under Rule 11, and yet refuse to enter factual findings that explain the basis for its conclusion that a lesser sanction is inadequate. The appellate court, which must apply a deferential standard of review to the district court's actions, will affirm the monetary sanction because the record — bare as it may be — does not indicate that the district court abused its discretion.

C. Appellate Review

The federal appellate courts examine the amount and type of a Rule 11 sanction under the abuse of discretion standard of review.[30] The advisory committee notes to Rule 11 emphasize that the district courts should have wide discretion to tailor sanctions to the particular facts of a case, and that the appellate courts must defer to the district courts' exercise of discretion.[31] Thus, under the current interpretation of the law, appellate re-

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[29] A prime but unfortunate example is Bogney v. Jones, 904 F.2d 272 (5th Cir. 1990). In *Bogney*, the Fifth Circuit affirmed a $6,000 monetary sanction against a plaintiff in a civil rights action. Because the district court had not entered factual findings, the record did not indicate either (1) whether the plaintiff had the ability to pay the sanction or (2) whether the sanction was the least severe adequate to serve the purposes of Rule 11. The *Bogney* court reasoned that it could *infer* that the $6,000 sanction was reasonable, and thus, that the sanction was not an abuse of discretion. *Id.* at 275.

[30] *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2460 (1990).

[31] FED. R. CIV. P. 11, Advisory Committee notes.

view of Rule 11 sanctions is limited. Unfortunately, this deferential standard of appellate review hinders the appellate courts' ability to enforce the concept of the least severe sanction adequate.

The District of Columbia Circuit, a fairly representative circuit, has recognized that district courts should impose the least severe sanction adequate to serve the purposes of Rule 11,[32] but it also has concluded that the authority of a district court to fix a fee award under Rule 11 is "virtually untrammelled."[33] If the discretion of the district court is, in fact, virtually untrammelled, the least severe sanction adequate doctrine is itself virtually unenforceable.

Other circuits have adopted a seemingly more lenient interpretation of the abuse of discretion standard of review. The Seventh Circuit has recognized that "[c]oncerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that [an appellate court] exercise less than total deference to the district court in its decision to impose Rule 11 sanctions."[34] Even in the Seventh Circuit, though, the abuse of discretion standard remains a deferential standard. The abuse of discretion standard, by definition, requires that appellate courts approve sanctions that find at least some credible support in the record.

As a result, under the current interpretation of Rule 11, the federal circuit courts rarely reverse monetary sanctions,[35] as long as they are reasonable.[36] In some cases, an appellate court has

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[32] Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990).

[33] *Id.* (quoting Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 896 (D.C. Cir. 1989), *rev'd on other grounds sub nom.*, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 275 (1990)).

[34] *In re* Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988).

[35] Indeed, the appellate courts have affirmed awards of attorneys' fees that are greater than the actual fees expended. *See* Doyle v. United States, 817 F.2d 1235, 1236-37 (5th Cir. 1987)(district court awarded 25 times the amount of fees incurred).

[36] If a party seeks an award of attorneys' fees as a Rule 11 sanctions, the amount of the fees must be reasonable. *See, e.g.*, Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 878-79 (5th Cir. 1988) (en banc); INVST Fin. Group v. Chem-Nuclear Systems, 815 F.2d 391, 404 (6th Cir.), *cert. denied*, 108 S. Ct. 291 (1987). As a corollary of this "reasonableness" requirement, the appellate courts have required that the moving party mitigate the fees expended to challenge the frivolous motion or pleading. *See, e.g.*, Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195-96 (3d Cir. 1988); *Thomas*, 836

concluded that a monetary sanction is perhaps excessive, and has remanded the case to the district court for reconsideration in light of the least severe sanction adequate doctrine.[37] This type of disposition, however, is itself rare. More commonly, the appellate courts simply acquiesce in the sanction selected by the district court, even if the sanction is a substantial monetary award that clearly is not the least severe sanction adequate to deter future misconduct.

II. The Future of Rule 11: Reinforcing the Principle of the Least Severe Sanction Adequate

In response to the controversy generated by Rule 11, the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure has recently proposed sweeping amendments to Rule 11.[38] These amendments are currently being circulated for public comment by the Judicial Conference's Standing Committee on Federal Rules of Practice and Procedure.[39] While the proposed amendments hold promise, they fall well short of adopting the reforms necessary to eliminate the worse of the problem with current Rule 11 practice.

A. The Proposed Amendments to Rule 11

The Advisory Committee has thoroughly reorganized Rule 11. The proposed new rule divides Rule 11 sanctions into two broad categories — those imposed on motion of a party and those imposed on the court's own initiative — and establishes different procedures for imposing sanctions in each category, and different limitations on the sanctions available in each cate-

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F.2d at 878-79.

[37] Spiller v. Ella Smithers Geriatric Center, 919 F.2d 339, 348 (5th Cir. 1990); Jennings v. Joshua Indep. School Dist., 877 F.2d 313, 321-22 (5th Cir. 1989); Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1202 (5th Cir. 1988); Cabell v. Petty, 810 F.2d 463, 467 (4th Cir. 1987).

[38] For the text of the proposed amendments, see the appendix.

[39] The amendments were originally drafted by the Advisory Committee, which submitted them to the Standing Committee. Before circulating them for public comment, the Standing Committee refined the Advisory Committee's proposals in certain respects. For the sake of convenience, this article refers to the amendments, as refined by the Standing Committee, as the Advisory Committee proposals.

gory. One important difference relates to the ability to withdraw a pleading or other paper that violates Rule 11. Before a party may file a motion for sanctions, the party must first serve the motion on the party whose pleading or other paper is being challenged and allow that party 21 days to correct or withdraw the challenged paper or pleading.[40] The proposed amendments thus create a sort of "safe harbor" for litigants: at least when sanctions are sought by another party, the party in jeopardy will have an opportunity to reassess and, if necessary, correct or withdraw a challenged paper or pleading.[41] Although there is no similar "safe harbor" in cases in which a sanction is imposed on the court's own initiative, the party in jeopardy will at least be entitled both to notice that the court is considering sanctions, and to an opportunity to be heard.[42] In addition, when a court imposes sanctions on its own initiative, it may not award attorneys' fees at all, and may impose other monetary sanctions (such as a fine payable to the court) only if the violating party has not voluntarily dismissed its action or settled the case.[43]

Equally importantly, the Advisory Committee has proposed two changes designed to refocus the federal courts' attention on the concept of the least severe sanction adequate to deter similar misconduct, and to emphasize the availability of nonmonetary sanctions. First, the proposed amendments explicitly incorporate into the rule the doctrine of the least sanction adequate to deter similar misconduct. Under the amended Rule 11, when a district court imposes a sanction, whether on its own initiative or on motion of a party, the sanction is expressly "limited to what is suf-

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[40] FED. R. CIV. P. 11(c)(1)(A) (Proposed Amendment 1991).

[41] The Advisory Committee Notes to the proposed amendments explain that:

> [t]he motion for sanctions is not . . . to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing some allegation or contention, the motion should not be presented to the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

FED. R. CIV. P. 11, advisory committee notes (Proposed Amendment 1991).

[42] FED. R. CIV. P. 11(c) (Proposed Amendment 1991).

[43] FED. R. CIV. P. 11(c)(1)(B) (Proposed Amendment 1991).

ficient to deter comparable conduct by persons similarly situated."[44] Second, the Advisory Committee has included in the amendments explicit mention of nonmonetary sanctions: a "sanction may consist of, or include, directives of a nonmonetary nature."[45]

Emphasizing the importance of the doctrine of the least severe sanction adequate and the availability of nonmonetary sanctions is a useful step. Emphasis alone, however, is unlikely to bring any real change to Rule 11 practice. After all, the federal courts of appeals have held and emphasized under current Rule 11 that district courts should consider alternatives to monetary sanctions, but the district courts have largely ignored these entreaties, and the appellate courts have not enforced them. Because the federal courts have not of their own accord hewn closely to these principles, further changes in the rule are required.

B. Proposals for Further Amendments

Three additional changes are necessary. First, the rule must be amended to restrict the availability of attorneys' fees to the most egregious cases. Second, the appellate courts must be directed to assume a vigorous role in reviewing and policing the imposition of sanctions. Third, in order to facilitate more vigorous appellate review of sanctions, district courts must be required, when imposing sanctions, to indicate for the record what conduct justifies sanctions and why the particular sanction imposed was appropriate.

1. Limiting the Availability of Attorneys' Fees

The only sure way to reduce district courts' reliance on at-

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[44] FED. R. CIV. P. 11(c)(2) (Proposed Amendments 1991).

[45] *Id.* FED. R. CIV. P. 11(c) (Proposed Amendment 1991).

In keeping with existing case law, the Advisory Committee Notes explain that:

> [t]he court has available a variety of possible sanctions, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities; etc. . . . [F]or emphasis, [the rule] does specifically note that sanctions may be nonmonetary as well as monetary.

torneys' fees is to restrict the availability of those fees. Accordingly, the rule should be amended to limit the availability of attorneys' fees to those cases in which the district court finds that a pleading, motion, or other paper has been presented for some improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[46] In a case presenting a less egregious violation, a district court should be required to impose some alternative sanction, such as a reprimand, ordering a course of legal education, or a small fine payable to the court. The Advisory Committee itself has proposed limiting attorneys' fees to cases in which sanctions are sought by a party; that is, a court may not award attorneys' fees on its own initiative. This limitation is an appropriate one: the court should not award attorneys' fees to a party that has not requested them.[47] This limitation, however, is not adequate, as it does not address the majority of cases, in which sanctions are imposed on the motion of a party.

The advantages of limiting awards of attorneys' fees to the most egregious cases are evident. District courts would be required to employ alternative sanctions more frequently, and would be more likely to select sanctions that fit the offense. Indeed, alternatives to attorneys' fees need not be imposed singly; they may be employed to good effect in combination with each other. For instance, in an appropriate case, a district court could reprimand an offending attorney, hold the attorney liable for

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[46] This language is drawn from the Advisory Committee's proposed amendments. Under the proposed amendments, a district court may not order monetary sanctions against a represented party, as opposed to the party's attorney, unless the party itself is responsible for an argument, pleading, or other paper made or filed for an improper purpose, such as to harass an opponent, delay proceedings, or unnecessarily increase the cost of litigation. The proposed rule would thus substantially alter the current rule, announced in Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S. Ct. 922 (1991). In *Business Guides* the Supreme Court declared that a district court may impose monetary sanctions against a represented party who signs a frivolous pleading or motion. *Id.* at 928.

[47] The imposition of attorneys' fees differs fundamentally from the imposition of nonmonetary sanctions. Accordingly, while we reject the rule announced by the Fifth Circuit in Port Drum Co. v. Umphrey, 852 F.2d 148, 151 (5th Cir. 1988), that a district court need not consider alternative sanctions that a party has not requested, we embrace the Advisory Committee's proposal preventing courts from awarding attorneys' fees that have not been requested. *See supra* note 23 and accompanying text.

costs, and require some course of legal education in the area of the law in which the violation occurred. Such a combination would undoubtedly encourage the attorney to be more careful in the future, but would not threaten the attorney's ability to practice or even dissuade the attorney from pressing legitimate but difficult positions with vigor.

2. More Vigorous Appellate Review

In addition to restricting monetary sanctions to the most egregious cases, the amendments to Rule 11 must also direct the federal appellate courts to assume a more vigorous role in reviewing the sanctions imposed by district courts, in order to better police possible abuses.

As noted previously, the appellate courts presently review sanctions only for an abuse of discretion, and as a result cognizable breaches of the least sanction adequate doctrine have gone uncorrected. The district courts undoubtedly should have the discretion to fashion an appropriate sanction, but experience with Rule 11 since 1983 has taught that the discretion of the district courts must be restrained. If that decision is not restrained — and if the courts of appeals do not abandon their tendency to acquiesce in the imposition of substantial and often unwarranted monetary sanctions — then the value of any amendments to Rule 11 will be severely curtailed. Unfortunately, the Advisory Committee has not clearly provided for more vigorous appellate review, and in failing to do so has perpetuated the prevailing, and problematic, standard.[48]

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[48] Interestingly, both the Supreme Court and the Advisory Committee had recognized that the imposition of sanctions cannot be left to the unfettered discretion of the district court. Even as it decided in *Cooter & Gell* that appellate courts should review decisions to impose sanctions only for an abuse of discretion, the Court noted that some variation in the application of that standard was inevitable. In an attempt to limit the variance, the Court qualified its holding to state that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." 110 S. Ct. at 2460. The Supreme Court thus recognized, at least implicitly, the potential for abuse of Rule 11 inherent in an overly deferential standard of review. Indeed, one might even take this language as a suggestion that review of some aspects of the decision to impose sanctions, for all practical purposes, should be either de novo, or for clear error.

Indeed, before *Cooter & Gell* was decided, the Ninth Circuit applied a three part

3. Factual Findings

Finally, in order to facilitate more vigorous appellate review, and to encourage district courts to consider alternatives to monetary sanctions, the Rule should require district courts to enter findings on the record which explain why the sanction imposed is the least sanction adequate to deter similar misconduct. Such findings should be required at least in all cases in which attorneys' fees are awarded. If the district court fails to make such findings, the rule should require the appellate court to remand the case so that the district court can provide reasons for its decision to award attorneys' fees.

In the proposed amendments the Advisory Committee has provided for the entry of factual findings in some cases. The proposed new rule requires that "[i]f requested, the court, when imposing sanctions, shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed."[49] While this provision represents a marked improvement over current practice, it may nonetheless prove inadequate. The problem is that the Advisory Committee has not made clear just what the district court is required to state for the record. For several reasons, the rule ought to be amended to state plainly that when a district court imposes Rule 11 sanctions — whether on the motion of a party or on the court's own initiative — the court must specify, for the record,

> (1) what pleading, motion, or other paper is in violation of Rule 11,
> (2) why it is in violation,

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standard of review to Rule 11 sanctions. Factual findings were reviewed for clear error, legal conclusions de novo, and the choice of an appropriate sanction for an abuse of discretion. *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

The Advisory Committee also recognized the potential problems with an excessively deferential standard of review. While the committee's notes state that sanctions should continue to be reviewed only for an abuse of discretion, the committee approved the language from *Cooter & Gell* suggesting that a district court necessarily abuses its discretion if it bases its decision on an erroneous view of the law, or a clearly erroneous assessment of the evidence. FED. R. CIV. P. 11, Advisory Committee notes (Proposed Amendment 1991).

[49] FED. R. CIV. P. 11(c)(3) (Proposed Amendment 1991).

(3) what factors the court considered in choosing an appropriate sanction,
(4) what sanctions, if any, were considered and rejected, and
(5) why the court believes that the sanction imposed is the least severe sanction necessary to deter similar misconduct.

Although it may seem somewhat bothersome to require district courts to consider each of these issues and to note their conclusions for the record, the requirement is well justified. First, the bother is not that great: the factors listed are the factors a district court ought to consider in any event when imposing sanctions; all that is required here is that the court make a record of its deliberations. Second, given the potential size and effect of Rule 11 sanctions, a certain amount of care is warranted in the imposition of sanctions. Third, factual findings on each of these five issues would encourage federal district courts to consider more seriously the least sanction adequate doctrine, a doctrine which, if fully implemented, would eliminate the worst of the problems with the present rule. Fourth, requiring findings on each of these five issues is necessary if federal appellate courts are to review the imposition of sanctions more closely, to prevent abuses of the rule.

C. A Call for Judicial Tolerance

Finally, one further change in Rule 11 practice is required, although it is not a change amenable to codification in the Rule itself. It is, rather, a plea to federal judges. Attorneys must not be held to unreasonably high standards of practice. The goal of our system of justice is not to perfect a model display of adversarial exchange, but to resolve disputes, and to resolve them as quickly and cheaply as possible, with as little acrimony as possible. Rule 11 can help to achieve that goal — it can deter litigants from using the court to harass their opponents or delay proceedings — but it can also be used to frustrate that goal — by multiplying litigation, and making it more expensive, more acrimonious, and more damaging for all involved.

Like federal judges, attorneys make mistakes. Tolerance is required. The Advisory Committee has recognized as much: the proposed amendments give attorneys an opportunity to correct innocent mistakes. The federal judiciary should do the same.

Judges must be aware of the demands made on attorneys, and the simple fact that the practice of law, despite our carefully designed rules of civil procedure, remains imprecise. There are few shades of black or white, and on the most difficult questions, there often are only varying shades of gray. Federal judges must countenance, as part of their jobs, attempts to prove marginal claims, to establish novel defenses, and to change the law. In addition, while most of the advocates who appear before them are good, or even very good, federal judges must expect, as part of their office, to put up with a certain amount of borderline, or even bad, lawyering. Unless these realities are kept in mind, no amendments to Rule 11 will ameliorate the problems that plague the current rule.

III. Conclusion

The federal courts of appeals have recognized that, if a party breaches the requirements of Rule 11, the district courts should impose the least sanction adequate to serve the purposes of the rule. These same appellate courts, however, have affirmed substantial awards of attorneys' fees that were imposed without consideration of the least sanction adequate doctrine. As a consequence of the less than rigorous appellate review of sanctions, parties that prevail in litigation frequently have used Rule 11 as a handy method to recover their attorneys' fees. And, despite the warning of the Supreme Court that Rule 11 is not a fee-shifting statute, awards of attorneys' fees remain the favored sanction under the current version of Rule 11.

The proposed amendments to Rule 11 offer some measure of relief from the present reliance on awards of attorneys' fees, but do not go far enough. While the proposed amendments emphasize that district courts should consider alternatives to attorneys' fees, the amendments do not ensure that appellate courts can sufficiently control the district courts' discretion to impose Rule 11 sanctions. In sum, even under the proposed amendments, the district courts have little incentive to impose the least sanction adequate to serve the purposes of Rule 11.

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
PROPOSED RULE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) **Signature.** Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not representated by an attorney, shall be signed by the party. ~~, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ It shall state such person's address and telephone number, if any, Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) **Representations to Court.** ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall imposed upon the person who signed it a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the

circumstances—

(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(c) **Sanctions.** Subject to the conditions stated below, the court shall impose an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of subdivision (b).

(1) **How Initiated.**

(A) By Motion. A motion for sanctions under this rule shall be served separately from other motions or requests, and shall describe the specific conduct alleged to violate subdivision (b). It shall not be filed with, or presented to, the court unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or such other time as the court may prescribe) after service of the motion. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter comparable conduct by persons similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded, either on motion or on the court's initiative, against a represented party unless it is determined to be responsible for a violation of subdivision (b)(1).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court's order to show cause is issued before a voluntary dismissal

or settlement of the claims made by or against the party to be sanctioned.

(3) Order. If requested, the court, when imposing sanctions, shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center, 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Vairo, Rule 11 Sanctions; Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision both broadens the scope of this obligtion and calls for greater restraint in considering the imposition of sanctions.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b)-(c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. Although continuing to require litigants to "stop-and-think" before initially making legal or factual contentions, the revised rule places equal emphasis on the duty of candor and on the obligation to withdraw from positions when they no longer are tenable.

First, the obligations are not measured solely as of the time a paper is filed with the court, but include the failure to withdraw or abandon a position after learning that it ceases to have any merit. The wording is sufficiently broad to cover the continued maintenance in federal court of totally meritless claims or defenses that were raised in state court before removal.

Second, the certification with respect to factual allegations and denials is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm evidentiary support for the allegation or denial. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifcally identified as made on "information and belief" does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances and is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule to withdraw the allegation or denial.

This change will serve to equalize the burden of the rule upon plaintiffs and defendants, who are permitted under Rule 8 to include denials in their answers based on lack of information obtained in their initial investigation. If, after further investigation or discovery, a denial is no longer warranted, the defendant will have a duty under revised Rule 11 to abandon its denial through an amended answer or at a pretrial conference.

The certification is that there is (or likely will be) "evidentiary support" for the allegation or denial—and not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has sufficient evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have had sufficient "evidentiary support" for purposes of Rule 11.

Third, the power of the court, when requested in a motion, to award attorney's fees for a violation of the rule is retained. A monetary award may be the most effective deterrent in some circumstances, and particularly for violations of subdivision (b)(1) payment to other parties to reduce the injury caused them may be more appropraite than a fine paid to the court. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, in a multi-count complaint a plaintiff were to make allegations in one count in violation of the rule, an award of expenses should be limited to those directly caused by inclusion of the improper allegations, and not from the filing of the case itself. The award should not provide compensation for services that could have been aovided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, ordering partial reimbursement of fees may constitute a sufficient deterrent regarding violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1987).

The court has available a variety of possible sanctions, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities; etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to order a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that sanctions may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity in other litigation: all of these may in a particular case by proper considerations. In general, the court should select sanctions that are not more severe than are needed to deter such improper conduct by similarly situated persons.

Fourth, the court may impose the sanction on the persons—whether attorneys, law firms, or parties—responsible for the violation. As under the former rule, the person signing a document has a nondelegable responsibility to the court and in most situations will be the one who should be sanctioned for a violation. However, sometimes it may be appropriate to impose a sanction on the attorney's firm, another member of the firm, or co-counsel, either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. The amendment is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Gp., ___ U.S. ___ (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may be imposed on a represented party only if it is responsible for presenting or maintaining contentions for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. So limited, the rule avoids possible problems under the Rules Enabling Act. See Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Last, explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed on them for violation of the rule. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, on request, indicate its reasons in a written order or on the record; the

court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., ___ U.S. ___ (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be filed. In some situations, a motion should be filed promptly after the inappropriate paper or presentation is made and, indeed, may be waived if delayed too long. In other circumstances, it will be more appropriate for a party to wait until conclusion of the case or at least until the resolution of a particular claim or defense. (See, however, revised Rule 54(d)(2) for the outer limit on when motions seeking attorney's fees can be filed.)

Rule 11 motions should not be filed as a discovery device, to emphasize the merits of a party's position, to extract an unjust settlement, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, if a sanction is requested before conclusion of the case, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or as to the identity of the person responsible for conduct violative of this rule.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing some allegation or contention, the motion should not be presented to the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the absis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. The revision also provides that the court may award to the person who prevails on a motion under Rule 11—whether the movant or the target of the motion—reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the conditions that this be done through a show cause order, thereby providing the person with notice and an opportunity to respond, and that any monetary sanction—which, when the court is acting on its own initiative, is limited to a penalty payable to the court—may be imposed in such circumstances only if the show cause order is issued before any voluntary dismissal or settlement of the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. The rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc. after a show cause order has been issued on the court's own initiative, but such an action should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

By its terms Rule 11 covers only matters presented to the court. It does not apply to certain disclosures and discovery papers under Rules 26-36 that may be served on other parties but not filed with or presented to the court. However, Rules 26(g) and 37 contain special provisions that impose similar obligations on litigants regarding such documents and conduct. Although discovery motions, requests, responses and objections are, if filed with the court, potentially subject to sanctions both under Rule 11 and under the discovery rules, it is anticipated that ordinarily sanctions with respect to such papers should be considered in accordance with the provisions of the discovery rules, rather than under Rule 11.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, requests, objections, or arguments. It does not supplant statutes permitting awards of attorney's fees

to prevailing parties, or alter the principles governing such awards. It does not inhibit the court in exercising its contempt powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. Finally, it does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

[Special Note for Publication: As drafted and as the proposed Notes indicate, discovery motions and other discovery documents filed with the court are potentially subject to snactions provisions both under the discovery rules and under Rule 11. The Advisory Committee expects to give further consideration, after receiving comments, to possible amendments—without further publication—to eliminate this "overlap" and make the sanctions provisions in Rules 26 and 37 the exclusive basis for sanctions involving discovery motions and papers. Accordingly, the Advisory Committee welcomes comments on this question.]

THE AVOIDANCE OF TYRANNY: LESSONS OF THE *HUDSPETH DOCTRINE*

*Wylene W. Dunbar**

I. Introduction

On May 23, 1985, the United States Court of Appeals for the Fifth Circuit adopted the "Hudspeth doctrine."[1] That doctrine recognized the exclusive authority of the Federal Savings and Loan Insurance Corporation (FSLIC) to adjudicate state law claims against the assets of savings institutions in receivership, even if those claims were already pending in state court prior to the institution of the receivership.[2] On March 21, 1989, almost four years later, the United States Supreme Court brought the doctrine's tenure to an end in its reversal of *Coit Independence Joint Venture v. FSLIC*.[3] In the interim, however, the FSLIC used *Hudspeth* extensively to wrest jurisdiction of claims from Article III courts and itself undertake the adjudication of those claims.[4] This apparent assault on judicial power

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[1] North Mississippi Sav. & Loan v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The three-judge panel considering the matter—Justices Reavley, Higginbotham and Thornberry—issued a unanimous opinion. It was their second opinion in the case. Their earlier opinion, also unanimous, had refused to adopt what became the Hudspeth doctrine. *See infra* note 170 and accompanying text. That opinion was revised on a Petition for Rehearing by FSLIC. *See infra* notes 168-174 and accompanying text.

[2] *Hudspeth*, 756 F.2d at 1101-03.

[3] 489 U.S. 561 (1989).

[4] *See, e.g.*, York Bank & Trust Co. v. Federal Sav. & Loan Ins. Corp., 851 F.2d 637 (3d Cir. 1988)(action contesting FSLIC determination that CDs issued by failed s&l were only insured to $100,000 instead of face value of $1,000,000); Sandia Fed. Sav. & Loan Ass'n v. Vernon Sav. & Loan Ass'n, 860 F.2d 608 (5th Cir. 1988)(action against s&l for

and the separation of powers doctrine seemed to assure that the

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alleged failure to repurchase loans); Carroll Farmers Branch Indep. School Dist. v. Johnson & Cravens, Inc., 858 F.2d 1010 (5th Cir. 1988)(school district brought action seeking to recover ad valorem property taxes); Andrew D. Taylor Trust by Taylor v. Security Trust Fed. Sav. & Loan Ass'n, 844 F.2d 337 (6th Cir. 1988) (action brought by FSLIC concerning validity of two collateral pledge agreements executed by s&l); Red Fox Indus. v. FSLIC, 832 F.2d 340 (5th Cir. 1987)(borrower's suit to enjoin s&l from collecting debt improperly conditioned on second loan); Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc., 828 F.2d 387 (7th Cir. 1987)(loan participant's suit to elect new substitute lead lender); FSLIC v. Bonfanti, 826 F.2d 1391 (5th Cir. 1987) (insolvent bank sought injunction against FSLIC to force compliance with pre-receivership settlement); Woods v. FHLBB, 826 F.2d 1400 (5th Cir. 1987)(owner of insolvent s&l sought injunction against appointment of Receiver); FSLIC v. Oldenburg, 658 F. Supp. 609 (D. Utah 1987)(participants in condominium projects sued failed s&l and directors for fraud and other breaches of duty); Acquisition Corp. of America v. Sunrise Sav. & Loan Ass'n, 659 F. Supp. 138 (S.D. Fla. 1987)(loan participant's suit against s&l for fraud, deceit, RICO violations, breach of contract and civil theft); Godwin v. FSLIC, 806 F.2d 1290 (5th Cir. 1987)(depositors' suit for uninsured balance of account at insolvent s&l); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987)(depositor's suit against s&l for fraudulent and negligent misrepresentation, RICO, tortious conduct under state law including negligent supervision); First Financial Sav. & Loan of El Dorado v. FSLIC, 651 F. Supp. 1289 (E.D. Ark. 1987)(loan participant suit against lead lender); FHLBB v. Hague, 664 F. Supp. 245 (W.D. La. 1987)(FHLBB petition to enforce cease and desist order against s&l; counterclaim to set aside order); FSLIC v. Quality Inns, Inc., 650 F. Supp. 918 (D. Md. 1987)(FSLIC receiver's suit to recover assets alleging breach of contract, fiduciary duty and conversion; counterclaim alleged unjust enrichment and conversion); Quackenbush v. Audubon Federal Sav. & Loan Ass'n, No. 86-2470, slip. op. (E.D. La. 1987)(borrower's suit against failed s&l for breach of loan agreement); FSLIC v. Villard, No. WC 86-51-S-D, slip. op. (N.D. Miss. 1987)(suit against North Mississippi Sav. & Loan's principal stockholder for improper acts); FSLIC v. Simmons, Nos. 86-420, 86-1489, slip op. (E.D. La. 1987); York Bank & Trust Co. v. FSLIC, 663 F. Supp. 1100 (M.D. Pa. 1987)(depositor's suit contesting insured value of certificates of deposit with face value over $1M); Chupik Corp. v. FSLIC, 790 F.2d 1269 (5th Cir. 1986)(construction company's claim against s&l based on materialman's lien); FSLIC v. Sajovich, 642 F. Supp. 74 (C.D. Cal. 1986)(suit by FSLIC as conservator against directors and corporations); First American Sav. Bank v. Westside Federal Sav. & Loan Ass'n, 639 F. Supp. 93 (W.D. Wash. 1986)(participation lender's suit against lead lender); Polister v. Rosch, No. 86 C 0776, slip op. (N.D. Ill. 1986)(state court action for fraud); Sunrise Sav. & Loan Ass'n v. Lir Dev. Co., 641 F. Supp. 744 (S.D. Fla. 1986)(mortgage foreclosure in state court, post receivership); Colony First Federal Sav. & Loan Ass'n v. FSLIC, 643 F. Supp. 410 (C.D. Cal. 1986)(creditors' suit against U.S., FSLIC, FHLBB and local Bank Board to recover damages from placement of s&l into receivership); Baskes v. FSLIC, 649 F. Supp. 1358 (N.D. Ill. 1986)(trustee's suit for bank determination that trust accounts were his individual accounts because of failure to execute signature cards);Baer v. Abel, 648 F. Supp. 69 (W.D. Wash. 1986)(shareholder's suit against s&l for securities and other violations); FSLIC v. Hall Whispertree Assocs., 653 F. Supp. 148 (N.D. Tex. 1986)(apartment complex owners' suit to enjoin FSLIC from conducting nonjudicial foreclosure); Union County Bank v. Knox Capital Corp., No. C/A 657, slip op. (Tenn. Ct. App. 1986)(state

Hudspeth doctrine's constitutionality would ultimately have to be addressed by the Supreme Court. However, the high court's eventual rejection of the doctrine was based, in accordance with its usual practice,[5] on the narrowest of grounds.[6] In the *Coit* de-

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court suit by bank against failed s&l for breach of contract); FSLIC v. Superior Court of San Joaquin County, 225 Cal. Rptr. 422 (Cal. Ct. App. 1986), *cert. denied sub. nom.*, American Sav. & Loan Ass'n v. FSLIC, 107 S. Ct. 949 (1987)(creditor's suit against failed s&l for preservation of pre-receivership writ of attachment); Keller v. Antioch Sav. and Loan Ass'n, 492 N.E. 2d 937 (Ill. App. Ct. 1986)(real estate developer's suit against s&l in receivership for breach of joint venture agreement); Gibraltar Bldg. & Loan Ass'n v. State Sav. & Loan Ass'n, 607 F. Supp. 722 (N.D. Cal. 1985)(ex parte application to attach order and for writ of attachment against party to loan participation agreement); Rembold v. Gibraltar Sav. & Loan Ass'n, 624 F. Supp. 1006 (W.D. Wash. 1985)(subsequently overturned by Morrison-Knudsen).

Some courts, though very few, refused to apply the Hudspeth doctrine: *See, e.g.*, Murdock-SC Assocs. v. Beverly Hills Fed. Sav. & Loan Ass'n, 815 F.2d 82 (9th Cir. 1987)(suit to foreclose vendor's lien against failed s&l); Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209 (9th Cir. 1987)(with future United States Supreme Court Justice Anthony Kennedy as part of the three-judge panel); Glen Ridge I Condominiums, Ltd. v. FSLIC, 734 S.W.2d 374 (Tex. Ct. App. 1987)(holding FSLIC's claims of exclusive jurisdiction to be in violation of Article III of the Constitution); Federal Sav. & Loan Ins. Corp. v. Provo Excelsior Ltd., 664 F. Supp. 1405 (D. Utah 1987)(following Morrison-Knudsen Co.); Peninsula Fed. Sav. & Loan Ass'n v. FSLIC, 663 F. Supp. 506 (S.D. Fla. 1987)(loan participant's suit against FSLIC receiver); Homestead Sav. v. Life Sav. of Am., No. 86 C 20268, slip op. (N.D. Ill. 1987); Sun Belt Fed. Bank v. Spanish Town Partnership, No. 86-403-B, slip op. (M.D. La. 1987)(mortgage debtor's suit aginst failed s&l alleging conversion); Jugum v. FSLIC, 637 F. Supp. 1045 (W.D. Wash. 1986)(account holder's suit to enforce claims for deposit insurance); FSLIC v. Kennedy, 732 S.W.2d 1 (Tex. Ct. App. 1986)(FSLIC could not readjudicate claims after already determined by final judgment).

For a more detailed account of the doctrine's application in state and federal courts, see Baxter, *Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships*, 1988 DUKE L.J. 422, 441-49.

[5] The Court has long made made it its practice not to decide issues, including constitutional issues, that are not specifically before the Court. "Particularly in an area of constitutional law such as that of 'Art. III Courts,' with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy." Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)(following Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33 (1885) and United States v. Raines, 362 U.S. 17 (1960)).

[6] *Coit*, 489 U.S. at 578. The Court found that first the FSLIC did not have the claimed adjudicatory authority, rejecting the Hudspeth doctrine, and secondly creditors of the failed institutions were not required to exhaust the existing administrative claims procedure before instituting litigation. *Id.* at 586-87. The latter issue was addressed because it was a position pressed by the United States Solicitor General who, by law, was the Respondent arguing for the FSLIC. *Id.* at 579. The FSLIC, however, had maintained,

cision, those grounds were merely the lack of the statutory mandate claimed by the administrative agency for its seizure of adjudicative powers and the failure of the FSLIC to provide reasonable time limits for consideration of creditors' claims under its existing administrative claims procedure.[7] The constitutional question, whether the powers claimed by the FSLIC improperly encroached upon the judiciary in violation of Article III of the United States Constitution and the separation of powers doctrine, was never reached.[8]

In failing to consider the constitutional aspect of the Hudspeth doctrine, the Court let pass a golden opportunity. The law regarding the separation of powers and, specifically, the exercise of judicial power by administrative agencies, is in a most confused state. The law in this area has not yet coalesced into any definite form, and certainly not into any form that offers the de-

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in the lower court, that it had the right to adjudicate claims to the *exclusion* of courts, per the Hudspeth doctrine. *Id.* Apparently, this more radical position was made at the instance of the FSLIC, through amicus briefs in "support" of the Respondent. *See, e.g.*, Brief of Amicus Curiae National Council of Savings Institutions in Support of Respondent; Motion of the Federal Home Loan Bank of Dallas, Federal Home Loan Bank of San Francisco, and Federal Home Loan Bank of Topeka for Leave to File Brief as Amici Curiae and Brief as Amici Curiae Supporting Affirmance (Although this Motion was objected to by Petitioner, the Brief was considered by the Court. *See Coit*, 489 U.S. at 578). Amicus Curiae Briefs in support of the Petitioner, Coit, were filed by Joseph M. Hudspeth; United States League of Savings Institutions; and George S. Watson, A. Starke Taylor, III and Watson & Taylor Realty Company. *Coit*, 489 U.S. at 564.

[7] *Coit*, 489 U.S. at 564. FSLIC claimed authority to adjudicate under the language of 12 U.S.C. § 1464(d)(6)(C) and 1729 (b) and (d). Section 1729(d) granted FSLIC power, as Receiver, to "settle, compromise, or release" claims against the failed institution. § 1729(b)(1)(B) directed FSLIC to "pay all valid credit obligations." The exercise of these powers and directive do not require adjudicatory authority, nor does the language confer it. *Coit*, 489 U.S. at 573. Likewise, judicial resolution of a state law claim against a failed institution under an FSLIC Receiver does not "restrain or affect" the exercise of receivership powers within the meaning of § 1464(d)(6)(C) which provides in part that "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of . . . any receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a . . . receiver." *Id.* at 575-76. The Fifth Circuit's error was in assuming the resolution of such claims judicially would restrain the Receiver by preventing prompt liquidation of assets. However, as the Supreme Court noted, Receivers may make interim distributions of assets pending the resolutions of disputes in litigation. *Id.* at 576.

[8] *Id.* at 579. The *Coit* Court did observe, however, that the Fifth Circuit's interpretation of the statutes in issue raised "serious constitutional difficulties," and that "those statutes can and should be read to avoid these difficulties."

sired degree of predictability and uniformity of application.[9] The Hudspeth doctrine at issue in *Coit* could have helped the Court remedy this situation. The application of the doctrine[10] provided an empirical test for the theoretical possibilities that have recently concerned the Court in its debate over separation of powers.[11] Both the *Hudspeth* case and the ill-fated doctrine it spawned contain valuable lessons. Not the least of these is a concrete example of the evils our founders sought to avoid by creating independent branches of government, including an independent judiciary.

What follows sets out the lessons the Court failed to reach in *Coit* and, also, applies those lessons toward reaching a better standard for determining violations of Article III and the separation of powers doctrine.

This task necessarily requires an explanation of the legal context in which the *Hudspeth* case and, later, the *Coit* case were decided. The origins and general application of the separation of powers doctrine are discussed first, followed by an account of the specific precedents that could have formed the basis for a decision of the constitutional question in *Coit*, i.e., the con-

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[9] *See infra* notes 25-42 and accompanying text. *See generally* L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (October 1988); *Supreme Court, 1988 Term*, 103 HARV. L. REV. 40 (1989); Sargentich, *The Contemporary Debate about Legislative-executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

[10] *See* Joseph M. Hudspeth's Brief as Amicus Curiae in Support of Petitioner, *Coit*, U.S. Supreme Court Docket No.87-996. The Court was advised of the doctrine's application to Hudspeth's claim through an amicus curiae brief filed in *Coit* by Hudspeth in support of the Petitioner Coit. The brief tracked the handling of Hudspeth's claim by the FSLIC as a result of the Fifth Circuit's decision in *Hudspeth*. *Id.* The Court also had the benefit of seeing the extent to which FSLIC was using the doctrine. *See supra*, note 4.

[11] The Court has shown an especial interest in the separation of powers between governmental branches in recent years and, particularly, as that question has been addressed in the area of "administrative law." G. Young, *Public Rights and the Federal Judicial Power: from* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFFALO L. REV. 765, 767 (1986). "The Court's decisions against the Bankruptcy Act of 1978, the Gramm-Rudman-Hollings Act, and the 'legislative vetoes' contained in hundreds of federal laws, make clear that the Court has been troubled by possible departures from the original scheme of balanced powers." *Id.*

stitutionality of the adjudication of state law claims—to the exclusion of Article III and state courts—by an administrative agency. With the theoretical framework in place, the empirical data will be examined by way of a chronological account of the *Hudspeth* case, including the FSLIC's administrative adjudication of Hudspeth's state law claims.

When the "lessons" are ready to be enumerated, several should already be apparent to the reader from simply having read the account which preceded them. How to use these lessons to reach a more satisfactory standard in determining judicial encroachment will not be similarly forthcoming. The debate over such a standard has continued among legal scholars, statespersons and members of the Supreme Court for the life of the American republic.[12] It would be presumptuous, and contrary to the way in which our law evolves, to hope that this debate will be concluded by the analysis which follows. What will be made clear, however, is that the present course is not a sound one. It is based on unreliable premises and is likely to produce results in fundamental conflict with the purposes of the separation of powers doctrine.[13]

II. The Separation of Powers Doctrine

A. Origins

The separation of powers doctrine, though unquestionably a cornerstone of our republic, is not mentioned in the Constitution; at most, it is only suggested.[14] Further, the notion of sepa-

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[12] *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962)(distinction between " 'constitutional' and 'legislative' courts has been productive of much confusion and controversy"); Fallon, *supra* note 9, at 916, 919-20.

[13] What if, for instance, the Court had been required to address the constitutionality of the Hudspeth doctrine? Given the current state of the law in this area, the Court might well have found the doctrine constitutional. *See infra*, notes 131-32 and accompanying text. When this conclusion is considered in light of the events of *Hudspeth* and the application of its doctrine, the inadequacy of the Court's present approach is evident.

[14] In the grant of the legislative, executive and judicial powers, the Constitution uses the term "vest." U.S. Const. art. I, § 1; art. II, § 1; and art. III, § 1. Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Ser-

rate and independent branches of government, although adopted by our founding fathers, did not originate with them.[15] The doctrine, instead, has its source in a view of political structure which, at the time our Constitution was drafted, had been espoused by various intellectuals,[16] and practiced[17] in differing de-

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vices, a Compensation, which shall not be diminished during their Continuance in Office.

. . .The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. . . .

U.S. CONST. art. III, § 1. Arguably, "vest" may be taken to imply an exclusive right of each branch to the exercise of the power "vested" in it. But, it could just as easily be construed as giving the exclusive right to each branch to delegate those powers as it pleased. The separation of powers doctrine, however, has been interpreted to prohibit such delegation. *See, e.g.*, Schechter Poultry v. United States, 295 U.S. 495 (1935); Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 729.

[15] This does not distinguish the doctrine necessarily from the provisions of the Constitution itself, which has been described as merely a refinement of the English Constitution and as a natural result of the influential background in English law, shared by most of the American settlers. *See* C. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 4, 5, 35-58 (2d ed. 1894). "Although the framers of our Constitution were without any grasp of the modern conception of the historical continuity of the race, they revered the ancient constitutional traditions of England. And thus it came to pass that Magna Charta, the Acts of the Long Parliament, the Declaration of Independence, and the Constitution of 1787 constitute the record of an evolution." *Id.* at 55 n.1 (quoting Brantly, *Formation of the Federal Constitution*, SOUTHERN L. REV., August, 1880, VI.352).

[16] Both Plato and Aristotle commended a "mixed state," blending influences from the different classes of constituents to achieve political stability. A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 38 nn. 112-114 (citing *II The Dialogues of Plato*, STATESMAN AND LAWS, Bk. VI, 757 (Random House ed., 1937); POLITICS, Bk. III, 1280a, 31-32; 1281a, 4-5, THE JOWETT TRANSLATION IN BASIC WORKS OF ARISTOTLE 1281a, 4-5 (McKeon-Random House ed., 1941)). Aristotle also recognized three functions of government—deliberative, magisterial and judicative—without necessarily advocating those functions be carried out by separate departments. *Id.* at 39 n. 118 (citing POLITICS, Bk. IV, 1297b, 35-1301a, 16). The Roman philosopher, Polybius, came closer to doing that in his suggestion that the different classes in society should be represented by separate governmental departments, each of which was competitive with the others, preventing "the natural tendency to decay which would result if any one of them became too powerful." G. SABINE, A HISTORY OF POLITICAL THEORY 154 (Third ed. 1961). *See generally* G. CATLIN, THE STORY OF THE POLITICAL PHILOSOPHERS 119 (1939).

[17] The work of these ancient philosophers provides the groundwork, if not the edifice, of the modern day separation of powers doctrine. Subsequently, other philosophers proposed separation, although not independence, of some or all of the legislative, executive and judicial functions in government. However, it was Montesquieu, following the 17th century writings of Locke and Blackstone, who first formulated the direct antece-

grees by other governments[18] for centuries.

The most influential of such sources on the Americans who drafted our constitution is generally understood to be the 18th century political philosopher, Montesquieu, whose works, including *The Spirit of the Laws*, were widely read in the American colonies.[19] Other 17th and 18th century thinkers whose notions of government were readily available to the Constitution's framers included Englishmen John Locke and William Blackstone.[20] Each of these men agreed on the fundamental reason for a division in the powers of government: *the avoidance of tyranny*. Thus, Montesquieu observed:

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person . . .there can be no liberty; because apprehen-

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dent to the American separation of powers doctrine. *See also* A. VANDERBILT, *supra* note 16, at 44-46; A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 13 nn. 41-44 (1976); Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 477-81 (1989)(capsule history of the separation of powers doctrine).

[18] *See T. Powell, Vagaries and Varieties in Constitutional Interpretation* 24 (1956). England provides the most notable example, of course, although the extent to which the doctrine was ultimately embraced in America may be regarded as "distinctive." *Id.*

[19] *See* Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 595 (1986); Bowsher v. Synar, 478 U.S. 714, 721-22 (1986). *See also* A. VANDERBILT, *supra* note 16, at 45. *Contra* J. MERRY, MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT 365 (1970) (stating that "the separation of powers in the United States probably originated in colonial and state politics more than in the pages of *L'Esprit des Lois*.") *Id.* at 365. Merry argues, among other things, that Constitutional authors took a few of Montesquieu's remarks out of context to give the weight accorded a "foreign-born" authority to their own views actually derived from other sources. *Id.* This analysis is given some support in Abraham D. Sofaer's recent treatise in its discussion of the course of dissatisfaction with colonial government and its influence on the Constitutional Convention. *See* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 15-38 (1988).

[20] *See, e.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963)(3d ed. 1698); 1 W. BLACKSTONE, COMMENTARIES, * 149 (1890). Of course, as discussed, the colonists also had their own experience with the separation of powers doctrine—to the extent it was practiced—in the English government of that time. *See supra* note 15.

> sions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[21]

This same rationale was embraced by those who ultimately drafted the United States Constitution. The First Continental Congress of 1774, in its deliberations, indicated acceptance of this view concerning the separation of powers doctrine.[22] Virtually every major figure in the formation of the republic expressed support for the political philosophy underlying the doctrine.[23] James Madison, writing in defense of what some saw as

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[21] C. MONTESQUIEU, THE SPIRIT OF LAWS, v. I, Book XI, pp. 151-52 (trans. T. Nugent, Colonial Press 1900). Blackstone, similarly, wrote:

> In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. . . . But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power, as may tend to the subversion of it's [sic] own independence, and therewith of the liberty of the subject.

1 W. BLACKSTONE, *Commentaries* * 146 (1898) (emphasis in original); *See also* J. LOCKE, OF CIVIL GOVERNMENT, SECOND TREATISE, Bk. 2, para. 143 (E.P. Dutton 1924).

[22] *See* A. HOWARD, THE ROAD FROM RUNNYMEDE; MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 180 (1968).

> It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

Id. at p. 445 (quoting *Journals of the Continental Congress: 1774-1789* 63-73 (Worthington Chauncey Ford ed., 1904)).

[23] *See, e.g.*, A. VANDERBILT, *supra*, note 16 at 4, 4 nn. 5-7 (citing XIII WRITINGS OF GEORGE WASHINGTON 277, 306 (Ford ed., New York, 1892)(From Washington's Farewell Address: "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.")); IV WORKS OF JOHN ADAMS 185, 186 (Chas. F. Adams ed., Boston, 1851)(From a 1775 letter to Richard Henry Lee: "It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the Constitution."); and III WRITINGS

the new Constitution's failure to completely follow the separation of powers doctrine, succinctly expressed the universally-accepted view:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[24]

B. Interpretations

Despite this singularity of purpose, what the separation of powers doctrine requires in practice has been a matter of disagreement from the very beginning.[25] Given the general nature of the doctrine, this was, perhaps, to be expected.[26] Nevertheless,

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OF THOMAS JEFFERSON 85, 223-224 (Ford ed., New York, 1894)(From *Notes on Virginia*: "The concentrating of these [powers] in the same hand is precisely the definition of despotic government.")).

[24] THE FEDERALIST No. 47, at 300 (J. Madison)(H. Lodge ed. 1888) Madison explained in his essay that, while the three branches of government were, and were meant to be, separate under the Constitution, there must necessarily be some connections whereby each was able to exercise some check on the other. This is generally the basis upon which "functionalists" argue for a nonrigid approach to the separation of powers doctrine. Madison himself appeared to align with the formalists, however, when arguments over the doctrine's meaning first began. THE FEDERALIST and Alexander Hamilton, in particular, however, have been characterized as abandoning the strict separation of powers, especially between the legislative and executive branches. *See* R. GETTELL, HISTORY OF AMERICAN POLITICAL THOUGHT at 137-38, 169 (1928). Even so, the independence of the judiciary was favored, that department being the "least dangerous to the liberties of the people. . . ."*Id.* at 138 (citing THE FEDERALIST, Nos. 77-83).

[25] The first steps toward defining the parameters of the separation of powers under our Constitution occurred very early. In May of 1789, a challenge was raised to the legislative proposal that the Secretary of Treasury report "plans" regarding the budgeting of finances. A. SOFAER, *supra* note 19, at 65. Some members of the Congress objected on separation of powers grounds. Such "plans," they said, amounted to "bills" and usurped the legislative function of the House. *Id.* (citing 1 *Annals of Congress* 615-16, 624). The arguments raised and the concerns expressed on each side in that instance were the same ones that have been repeated throughout the history of the Constitution. On the one hand were those who feared any unnecessary "mixing" of governmental functions and its eroding effect on the separation of powers. On the other were those who pointed to the minimal nature of the encroachment and the expediency which outweighed it. In this early battle, expediency carried the day. A. SOFAER, *supra* note 19, at 65, 65 nn. 13-16.

[26] *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 2, n.6 (1958). Corwin makes this point in contrasting conflicting opinions on the doctrine authored by the same judges. Corwin, in particular, points to Chief Justice Taft's conflicting opinions

we have continued to struggle with the doctrine in the hope of reaching some uniform standard of application. Separation of powers issues have been raised between the legislative and executive branches,[27] between the legislative and judicial,[28] and between the executive and judicial branches of government.[29] The doctrine has been considered in regard to legislative courts,[30] judicial service on presidential commissions,[31] executive privilege,[32] declarations of war,[33] and limitations on government spending.[34]

Although the circumstances in which the doctrine has been

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in Ex Parte Grossman, 267 U.S. 87, 119-20 (1925) and Myers v. United States, 272 U.S. 52, 116 (1926), as well as Justice Black's conflicting opinions, both appearing in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 581, 585-89 (1952). There, Black wrote the opinion for the Court and also joined in the conflicting opinion for the minority written by Chief Justice Vinson. *Id.* at 683-700.

[27] *See, e.g.*, Myers v. United States, 272 U.S. 52, 161-62 176 (1926)(legislative power distinguished from executive; one may not usurp other); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585-88 (1952)(President improperly encroached on Congress' exclusive lawmaking authority in seizing steel mills).

[28] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 190-92 (1880)(The House of Representatives improperly encroached upon the judiciary when it imprisoned an uncooperative witness for contempt); United States v. Nat. City Lines, 334 U.S. 573, 587-89 (1947), *reh'g denied*, 334 U.S. 573 (1948) (Court's powers did not include ability to disregard Congress' valid enactment regarding venue provisions in Sherman Act).

[29] *See, e.g.*, National City Bank of New York v. Republic of China, 348 U.S. 356, 358-59 (1954)(status of foreign government in federal courts is executive matter outside competence of court).

[30] *See* Redish, *Legislative Courts, Administrative Agencies and Northern Pipeline*, 1983 DUKE L. J. 197.

[31] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 404 (1989)(finding no violation of Article III in judges serving on commissions such as that created by Sentencing Reform Act).

[32] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974)(doctrine does not require "an absolute, unqualified Presidential privilege of immunity from judicial process.").

[33] *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 697 (1862)(executive order of blockade did not impermissibly encroach on Congress' power to declare war).

[34] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 734 (1986)(Congress improperly encroached on constitutional power of executive branch "[b]y placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself. . . ."). *But see* L. LEVY, ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION 391 (1988)(criticizing decision by stating that: ("No Court that cared a fig for original intent and had any historical competence would have declared the Gramm-Rudman-Hollings Act unconstitutional on separation-of-powers grounds.").

considered differ, as well as the branches of government involved, the approach taken to any separation of powers question is generally characterized as either "formalist" or "functionalist."[35] A formalist approach is one which focuses on the nature of the challenged activity. Is it a "judicial act" or "interpreting the law?" If so, then it should only be undertaken by the judicial branch of government. If the activity is one of "making law," the Congress has exclusive domain. If the activity is one of "administering the law" or "enforcing the law," it can only be undertaken by the executive branch. The formalists allow for a certain amount of unavoidable overlapping. For instance, in reviewing potential Article III violations, the formalists permit three general exceptions.[36] But each exception is justified by reference to long-standing historical practice.

Functionalism rejects these rigid categories. Functionalists argue that the intent of the separation of powers doctrine is not to have literally independent branches of government but to provide each branch with checks and balances on the powers of the others. Not only would a complete separation of functions be unworkable,[37] they observe, it is also inefficient and unnecessary. Every branch, in the exercise of its "core" function, must engage in some of the activities of the other two.[38] The question to be asked in a functionalist approach is whether the exercise of the challenged activity "impermissibly intrudes into the *core* function or domain of" another branch of the government.[39]

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[35] *See* Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1254 (1988) (debate on separation of powers has turned on distinction between formalist and functionalist approach to resolving questions).

[36] *See infra*, note 43.

[37] Strauss, *Formal and Functional Approaches to Separation-of-powers Questions—A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 492-93 (1987)(formalism will not work because Congress-created parts of the government exercise all three powers—legislative, executive and judicial—and must do so for government to work.) Strauss continues by stating that "the government we have built and now live with has attained a complexity and intermarriage of function that beggars the rationalistic tripartite schemes of the eighteenth century. Identifying a satisfactory principle for assessing the permissibility of distributions of governmental power, much less one that can be rooted in the 'separation-of-powers' framework, may simply be too much to expect." *Id.* at 511-12 (footnote omitted).

[38] Krent, *supra* note 35, at 1254-55.

[39] *Id.* at 1255.

This divergence of views has continued, in much the same form, for the life of the American republic. Functionalists accuse formalists of being blind to the way government does, and must, work. Formalists charge that functionalists are sacrificing an essential principle in our democratic government for the sake of expediency. In its decisions, the United States Supreme Court, alternating between the two approaches, has mirrored this debate.[40]

If the Court insists on honoring all, or even most of its precedents in this area of the law, it is not difficult to see the direction of travel. Each time the Court uses a functionalist approach and justifies an activity that would be rejected under the formalist view, a new exception is created.[41] Additionally, if the exercise of, e.g., the judicial power by a non-Article III body is permitted under a functionalist analysis, it eventually will become a "historic practice" that will also be justified under the formalist view.[42] Likewise, with increasing population and in-

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[40] *See, e.g.*, Myers v. United States, 272 U.S. 52, 161 (1926)(formalist approach); Humphrey's Executor v. United States, 295 U.S. 602, 626-27 (1935)(formalist approach); United States v. Nixon, 418 U.S. 683, 707 (1974)(functionalist approach); Nixon v. Adm'r of General Services, 433 U.S. 425, 443-46 (1977)(functionalist approach); Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 59 (1982)(formalist approach); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 952-54 (1983)(formalist approach); Mistretta v. United States, 109 sct 647, 654-75 (1989)(functionalist approach). For a critique of the Court's inconsistency and, in particular, *Mistretta*'s justification of the Sentencing Commission as a constitutional entity, See *The Supreme Court, 1988 Term*, 103 HARV. L. REV. 40, 279-90 (1987).

An interesting observation regarding the Court's confusing alternation between formalism and functionalism is found in Strauss, *supra* note 37, at 492. Strauss notes that the Court has increasingly applied the formalistic approach when evaluating executive/legislative disputes on separation of powers and the functionalistic approach when the separation of powers issue involves the judicial branch. *Id.* at 516-517. This provides an air of objectivity and predictability for the other two branches in their disputes, while acknowledging the judiciary branch's position as the least powerful whose "consistent tendency" is to validate and avoid confrontation. *Id.*

[41] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 863-64 (1986)(Brennan, J., dissenting). "The danger of the Court's balancing approach is . . . that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated." *Id.*

[42] *Id.* One commentator has put it thusly:

> The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and

creasing strain on existing governmental resources, the appeal to economy and efficiency has more appeal than at any other time in our history.

This is not to suggest the debate is over; it is not. But it is evident that the functionalist "balancing" approach is the one finding more favor with the Court in recent years, at least in regard to those issues discussed here.

C. The Judicial Power and Administrative Agencies

Claims have been "adjudicated" by entities other than Article III courts since the early days of the Republic. The first cases focused on certain "exceptions" to Article III adjudication.[43] The "public rights" exception was articulated in *Murray's Lessee v. Hoboken Land and Improvement Co.*[44] which, coincidentally, involved the alleged exercise of the judicial power by a department of the executive branch. The decision offers an excellent example of the Escherian reasoning the Court has typically used in separation of powers cases. First, the Court announced what seemed to be a strict formalistic standard of decision:

> It must be admitted that, if [the challenged act] was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they . . . so connected with any such court as to perform even any of the ministerial duties

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> easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence.

Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 221-222.

[43] *See, e.g.*, Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272 (1855)(public rights exception); American Ins. Co. v. Canver, 26 U.S. (1 Pet.) 511 (1828)(territorial courts exception); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857)(courts-martial exception). *See generally* G. Young, *supra* note 11, at 765 (evolution and influence of public rights exception).

[44] 59 U.S. (18 How.) 272 (1855).

which arise out of judicial proceedings.[45]

It then recast the question before it in essentially these terms: "Can the treasury's act be one which deprives a person of his liberty or property by due process of law, without necessarily exercising the judicial power?"[46] The Court answered this question in the affirmative, finding that the act afforded due process and did not require the exercise of judicial power.[47] Finally, it stated that even though the controversy may ordinarily be regarded as judicial, it falls within an exception.

In finding that due process had been satisfied, the Court applied a two-prong test. First, is the act inconsistent with any Constitutional provision? Second, is it consistent with the historically accepted "law of the land?"[48] In answering the second of these questions, the Court looked to the practices under English law that were subsequently adopted by the American settlers.[49] Finding that the issuance of distress warrants and collection of taxes had been a well-established practice for centuries, the Court concluded that the treasury's acts were consistent with "the law of the land."[50]

The Court then addressed the remaining question, i.e., whether the acts violated any Constitutional provisions, including whether they were an exercise of judicial power in violation of Article III?[51] The Court admitted that the challenged acts themselves may be said to be, "in an enlarged sense," judicial in nature.[52] But, if bringing acts within the judicial power required only that "they involve the exercise of judgment upon law and

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[45] *Murray's Lessee*, 59 U.S. (18 How.) at 275.

[46] *Id.* at 275-76.

[47] *Id.* at 281.

[48] *Id.* at 276. The Court explained that due process, per se, was not defined by the Constitution. Nevertheless, it has been understood to have the same meaning as "by the law of the land," the phrase used in the *Magna Charta*. *Id.* "The law of the land," of course, encompasses not only the Constitution and statutes but also the practices accepted under the common law. *Id.* at 277.

[49] *Id.*

[50] *Id.* at 278.

[51] *Id.* at 277. In approaching the question in this manner, the Court suggested that the exercise of judicial power by one not empowered to do so is, in itself, a violation of due process. *Id.* at 276.

[52] *Id.* at 280.

fact," we would include so many acts not previously regarded as judicial so as to be brought to a *reductio ad absurdum*.[53] The appropriate question to be considered, according to the Court, was "whether [the act's] subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy."[54] The Court of *Murray's Lessee* ignored any analysis of the nature of the acts and, instead, turned again to history to examine what, in the past, had been considered to be a judicial controversy.[55] Finding that the challenged acts have historically been excepted from the judicial power as within the scope of the executive branch or its counterpart, it concluded that they did not violate article III.[56]

The "public rights" exception comes as the final twist on the *Murray's Lessee* decision. It was offered in answer to the Petitioner's rather poignant question as to how a claim whose final determination Congress has placed within the district court's jurisdiction can be other than a judicial controversy? The Court answered that there are some questions, those involving "public rights," which the Congress may, in its discretion, decide to place within the jurisdiction of an Article III court or not. Congress was entitled to do this in this case because it was conferring a benefit, in that it was waiving a governmental privilege not to be sued.

The Court again deferred to "historical" rights of Congress in *Crowell v. Benson*,[57] wherein it deemed adjudication of substantive rights by an administrative agency to be constitutional.[58] Crowell was deputy commissioner of the United States Employees' Compensation Commission. Under the Longshore-

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[53] *Id.* at 280. Examples offered by the Court include the President's calling of the militia or the certification for extradition of a criminal, both of which require application of law to facts, but neither of which are considered to be under the judicial power. *Id.*

[54] *Id.* at 281.

[55] *Id.* at 281-82.

[56] *Id.* at 282.

[57] 285 U.S. 22 (1931).

[58] *Crowell*, 285 U.S. at 22. *See also* Schwartz, *Nonacquiescence*, Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L. J. 1815, 1835-43 (1988) (analysis of *Crowell* as prologue to discussion of possibility of intracircuit nonacquiescence coexistence with Article III).

men's and Harbor Workers' Compensation Act,[59] he awarded compensation to Benson's employee for an injury received in "service upon the navigable waters of the United States."[60] In addition to disputing the merits of the claim, Benson also questioned the constitutionality of the commissioner's finding against him. He argued violation of due process under the fifth amendment, of his right to trial by jury under the seventh amendment, and he argued that the acts of the commissioner were an exercise of the judicial power in violation of Article III.[61]

The Court quickly dispensed with the seventh amendment argument, pointing out that juries were typically not available in admiralty and maritime cases such as this. The due process argument received a little more attention, but was finally dispensed with as well.[62] It is the Article III question which posed the biggest problem for the Court. Noting that the "instant case . . .can be deemed to relate only to determinations of fact,"[63] the Court recalled *Murray's Lessee* and subsequent cases which found non-Article III determination of facts in cases of public rights to be constitutional.[64] *Crowell*, however, involved *private*, not public, rights. The Court considered whether an administrative agency could constitutionally make a final determination of fact in a claim asserting a private right? In answering this question, the Court restated it instead to read, whether the Constitution requires all determinations of fact in constitutional courts to be made by judges?[65] It then looked to history to answer this question in the negative:

> On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Consti-

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[59] 33 U.S.C. § 901-50 (1927).

[60] *Crowell*, 285 U.S. at 36-37.

[61] *Id.*

[62] *Id.* at 45-46.The Court notes that questions of law are not determined finally by the Commissioner, but may be reviewed by the Federal Courts. *Id.* Those questions of fact that are finally determined by the commissioner "belong to the contemplated routine of administration" and the procedures applied are similar to ones already deemed to meet the requirements of due process under both the fifth and fourteenth Amendments. *Id.* at 47.

[63] *Id.* at 49.

[64] *Id.* at 50.

[65] *Id.* at 51.

> tution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions . . . .[66]

The method for determining facts is a procedural one which Congress may change and regulate, subject only to the limitations of the Constitution.[67]

> In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice.[68]

Thus, the practice of permitting the commissioner to make findings of fact as to claims within the Longshoremen's and Harbor Worker's Act was deemed constitutional.

One remaining problem was addressed by the *Crowell* Court. It concerned the facts that were related to the merits of the claim with the Act. What facts were "jurisdictional," or as the Court more precisely described them, those which determine whether a question "falls within the scope of the authority validly conferred?"[69] And, could those also be constitutionally determined by the administrative agency, a non-Article III body?

The Court decided that they could, although not without first going through a good deal of soul-searching. It recognized the dangers inherent in permitting adjudication outside Article III Courts:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the

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[66] *Id.*
[67] *Id.* at 53.
[68] *Id.*
[69] *Id.* at 54 n.17.

> Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.[70]

Therefore, the court will make a distinction "when questions of a fundamental character are in issue."[71] Those factual determinations, i.e., jurisdictional ones, must be reviewable *de novo* by an Article III court to ensure that constitutional rights are protected.

Neither of the preceding cases is a model of reasoned consideration. Instead, the rationales relied upon in each instance come close to ad hoc reasoning. Thus, they were easy cases because history already justified the Court's deference to Congress in areas that traditionally had been controlled by the Congress.

In 1982, however, the Court decided *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[72] the first of several cases that put much more pressure on the limits of separation of powers. The Article III question arose in the context of the 1978 Bankruptcy Act wherein Congress created new bankruptcy courts with broad jurisdiction presided over by judges who did not enjoy life tenure or salary protection.[73] Northern Pipeline filed suit in one of these new courts seeking damages from Marathon for claims based on state law.[74] Marathon moved to dismiss the claim, arguing that the Act unconstitutionally conferred Article III judicial power on judges who lacked the necessary protections accorded under that Article.[75] The district court agreed with Marathon and dismissed the action.[76] The Supreme Court affirmed, but in a decision which plainly showed the Court's con-

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[70] *Id.* at 56-57.

[71] *Id.* at 61.

[72] 458 U.S. 50 (1982).

[73] 28 U.S.C. § 1471 (1988). The new Act granted jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11" of the Bankruptcy Act. *Id.*

[74] *Northern Pipeline*, 458 U.S. at 50. The complaint cited breaches of contract and warranty, misrepresentation, coercion and duress. *Id.* at 56.

[75] *Id.*

[76] *Id.* at 56-57.

fusion and lack of agreement as to Article III questions.

The plurality opinion[77] followed a formalistic mode of reasoning. The Court made its initial determination that the bankruptcy judges did not meet the basic requirements to be Article III judges because they did not have life tenure and they did not have protection against salary diminution.[78] The Court next considered whether Congress' grant of jurisdiction of "all matters arising under the bankruptcy laws" was one which fell within an historically recognized exception to the separation of powers. The exceptions it considered included the "public rights" exception, territorial courts, such as those in Puerto Rico or the District of Columbia or courts-martial.[79] Since no exception applied,[80] the Court found no reason to allow such a jurisdictional grant to be constitutional.

The plurality opinion in *Northern Pipeline* was adopted by only four of the nine justices.[81] Two other justices joined in a concurring opinion[82] rather than adopt the plurality's reasoning.[83] The concurring opinion agreed that the exercise of authority by a non-Article III body over Marathon's state law contract dispute was violative of Article III.[84] In so concluding, it neither accepted nor rejected the plurality's formalistic view and its three exceptions.[85] Instead, the opinion relied on the fact that

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[77] *Id.* at 52. Justice Brennan wrote the plurality opinion. He was joined by Justices Marshall, Blackmun and Stevens. *Id.*

[78] *Id.* at 60-61.

[79] *Id.* at 64-71.

[80] *Id.* at 71. The Court distinguished *Northern Pipeline* from *Crowell* on the grounds that the rights at issue in *Northern Pipeline* were not public rights, but were either constitutionally recognized rights or private rights. They are not rights, public or private, which have been created by Congress. Thus, the bankruptcy courts' constitutionality cannot be defended on the basis of a previously recognized power of Congress to create adjuncts to Article III courts. *Id.* at 69-70.

[81] *See supra*, note 77.

[82] *Northern Pipeline*, 458 U.S at 89. The concurring opinion was written by Justice Rehnquist and joined by Justice O'Connor.

[83] *Id.*

[84] *Id.* at 91.

[85] *Id.* Justice Rehnquist writes: "I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be

there had never been any recognition of Congress's right to create adjunct courts to decide claims based solely on state law, absent the consent of the litigants.[86] Finally, the concurring opinion noted that the traditional appellate review provided for in the Bankruptcy Act was insufficient to redeem its courts.[87]

The dissenting opinions, principally the opinion by Justice White, were contemptuous of the plurality's "gross oversimplification" of the Article III issue presented to the Court.[88] In his lengthy and compelling dissent, Justice White took as his first premise the belief that the Court can no longer consider simply the Constitution, but must also take into account existing precedent.[89] He then carefully worked his way through the most significant of those cases to reach his own conclusion that the courts created by the 1978 Bankruptcy Act were, in fact, constitutional.

White characterized the plurality opinion as one with two grounds: 1) that a non-Article III federal court may not adjudicate questions of state law; and 2) that Congress may not establish Article I (legislative) courts, except in three exceptional circumstances—territorial courts, courts-martial and for adjudication of "public rights."[90] The effective basis of the *Northern Pipeline* decision is the first of these, White said, inasmuch as it was the only ground agreed upon by both the plurality and concurring opinions.[91]

White argued that neither of these grounds are supportable. Bankruptcy courts have historically been required to consider and apply state law. The additional power to entertain suits based on state law, which seek to collect the bankrupt's estate,

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subjected against its will under the provisions of the 1978 Act." *Id.*

[86] *Id.* at 90. The opinion does not offer any reason, other than this historical one, as to why the Court should not now allow Congress to exercise such power. It appears from his earlier statements that Justice Rehnquist believes this conclusion follows from both the formalist and functionalist viewpoints.

[87] *Id.*

[88] *Id.* at 93.

[89] *Id.* at 94.

[90] *Id.* at 100-16.

[91] *Id.* at 94. Justice O'Connor validates this conclusion in her opinion for the Court in the subsequent case of Thomas v. Union Carbide Agricultural Products Co. *See infra* notes 105-111 and accompanying text.

does not seem too great a step to take. Furthermore, state law claims are ordinarily heard by non-Article III bodies. What is the threat to Article III from their consideration by a non-Article III body simply because it is federal?[92] Finally, White argued that the plurality was too "heavy-handed."[93] There was no need to declare the entire act unconstitutional when the offending provision could simply be excised.[94]

White then turned to the second ground of the plurality's decision. He rejected the formalistic account and its three exceptions as an attempt to distinguish Article I from Article III courts which "fundamentally misunderstands the historical and constitutional significance of Article I courts."[95]

In the fourth section of his dissent, White contended that there was no difference in character between the subject matter addressed by Article I courts and that addressed by Article III courts.[96] Instead, "[w]hether an issue can be decided by a non-Article III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Article III court."[97] That determination is made through a balancing of interests of the legislative and judicial branches of government.[98]

I do not suggest that the Court should simply look to the

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[92] *Northern Pipeline*, 458 U.S. at 97-100. Justice White fails to mention that most state courts, while certainly not entities created under Article III of the federal Constitution, *are* entities created under virtually identical state constitutional provisions for separation of powers. Mississippi's constitution, for instance, provides:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
>
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. . .

MISS. CONST. art. 1, §§ 1, 2. It would be difficult to justify some overriding federal interest in violating a state constitutional requirement which is virtually identical to a requirement in the federal constitution.

[93] *Northern Pipeline*, 458 U.S. at 103.

[94] *Id.*

[95] *Id.* at 97-98.

[96] *Id.* at 113.

[97] *Id.* at 108 (characterizing and approving holding in *Murray's Lessee*).

[98] *Id.* at 115.

> strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.[99]

White went on to offer some advisory opinions as to what would be looked upon favorably under such a standard. Where appellate review to an Article III court is provided for, the Article I court will be less "controversial."[100] Likewise, where the issues to be presented to the Article I court are "of little interest to the political branches," their potential dangers are to be less feared.[101]

Under these standards, White concluded, the courts established by the 1978 Bankruptcy Act met constitutional muster. They provide for appellate review and involve matters of little political significance.[102] Finally, they are justified as a "specialized court," with White's view being that "the very fact of extreme specialization may be enough, and has been enough in the past, to justify the creation of a legislative court."[103]

The position taken by White in *Northern Pipeline* is clearly one he believes to be the most practical as well as the one most consistent with the Court's precedents and the way the government actually works. To the contrary, the plurality's formalistic view fails, he said, because it consists of "unsupportable abstractions, divorced from the realities of modern practice."[104] In 1985,

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[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 116. Thus, the creation of courts dealing with these issues cannot be considered an attempt of the legislative branch of government to "aggrandize" itself at the expense of the judicial branch. *Id.* at 116.

[103] *Id.* at 118 (footnote omitted). White further justifies such courts being established as Article I courts, rather than Article III, because of considerations Congress may have had: the need for flexibility in, e.g., reducing the number of specialized courts should circumstances change; or the belief that a change from bankruptcy referee's to Article I judges was less disruptive than a change to Article III judges. *Id.*

[104] *Id.* at 101. White specifically cites the adjudication by administrative agencies as

the United States Supreme Court decided the case of *Thomas v. Union Carbide Agriculture Products Co.*[105] at the same time the Fifth Circuit was establishing the Hudspeth doctrine. In *Thomas*, the Court reversed the district court's finding of encroachment under Article III. In doing so, the Court used an analysis barely distinguishable from the "balancing" approach White urged in *Northern Pipeline*.[106] The Court rejected the argument that the claims were, in fact, state-law claims or that the "public rights" doctrine of *Crowell* required Article III adjudication, at the very least, unless the federal government was itself a party.[107] "The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[108]

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being part of the legitimate framework of the government's modern day activities. *Id.* at 101, 118 n.18. For a critique of the effect of the *Northern Pipeline* decision, including Justice White's dissent, *see* Brown, *Article III as a Fundamental Value—the Demise of Northern Pipeline and its Implications for Congressional Power*, 49 OHIO ST. L. J. 55 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983).

[105] 473 U.S. 568 (1985). *Thomas* involved a challenge to the arbitration provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under the Act, the Environmental Protection Agency (EPA) was authorized to use certain previously submitted information in considering registration applications of a similar product only if the manufacturer of the similar product had offered to compensate the previous manufacturer. Under the act, if agreement is not reached, the parties must submit to binding arbitration with limited judicial review. Certain manufacturers and developers of chemicals used to manufacture pesticides affected by FIFRA sued the EPA alleging violation of Article III. *Id.*

[106] In *Thomas*, the Court was engaged in a "retreat from the expansive implication of the public rights doctrine as formulated in *Crowell*." Schwartz, *Nonacquiescence, Crowell v. Benson and Administrative Adjudication*, 77 GEO. L.J. 1815, 1888 (1989).

[107] *Thomas*, 473 U.S. at 587. While acknowledging that the decisions regarding state-law issues— those at the "protected core" of Article III—should still be reserved to Article III courts, O'Connor worried that consideration of the identities of the parties would cast doubt upon "the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals." *Id.* (citing 5 K. DAVIS, ADMINISTRATIVE LAW § 29:23, p. 443 (2d ed. 1984); Note, *A Literal Interpretation of Article III Ignores 150 Years of Article I Court History: Marathon Oil Pipeline Co. v. Northern Pipeline Construction Co.*, 19 NEW ENG. L. REV. 207, 231-232 (1983); and Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 262, n.39 (1982)).

[108] *Thomas*, 473 U.S. at 587. Justice O'Connor specifically adopted the reasoning of Justice White's dissent in *Northern Pipeline* when she stated that "The extent of judicial review afforded by the legislation reviewed in *Crowell* does not constitute a minimal requirement of Article III without regard to the origin of the right at issue or the concerns guiding the selection by Congress of a particular method for resolving disputes."

The Court reasoned that the challenged arbitration provision involved "quasi-public" rights.[109] The challenged provisions were also adopted for a laudable legislative purpose, i.e., to solve the "problem of spreading the costs of generating adequate information regarding the . . . impact of a potentially dangerous product." Further, there were adequate provisions for judicial review.[110] Following this "balancing," functionalistic analysis, the Court concluded that the provisions were constitutional.[111]

The Court's most recent consideration of the constitutional aspects of non-Article III adjudication by an administrative agency prior to *Coit* continued this functionalistic approach. *Commodity Futures Trading Commission v. Schor*[112] involved a challenge to the adjudication of state law *counterclaims* by the Commodity Futures Trading Commission (CFTC) in the course of reparation proceedings.[113] As in *Thomas*, the Court found the challenged adjudication to be Constitutional.[114] In doing so, the Court first distinguished between the structural protection of Article III for the tripartite scheme of government and its personal protection for an individual litigant's right to have his case heard before an impartial tribunal.[115] The latter is not an abso-

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Id. Cf. *Northern Pipeline*, 458 U.S. at 101 (White, J. dissenting).

[109] *Thomas*, 473 U.S. at 489. Since the Court had just repudiated the public/private dichotomy as a basis for Article III adjudication, it seems inconsistent for Justice O'Connor to raise this particular point. However, the Court had allowed that the "public" nature of a right was something that could indicate the "danger of encroaching on the judicial powers is reduced" in allowing Congress to select other than Article III adjudication of such right. *Id.* (footnote omitted).

[110] *Id.* at 591. The Court noted that the limited judicial review provided by the Act might be susceptible to a due process argument. It did not consider this, however, because the parties had stipulated to abandon any such claims. The Court did hold, nevertheless, that "FIFRA does provide for limited Article III review, including whatever review is independently required by due process considerations." *Id.* at 593.

[111] *Id.* at 593-94. Justices Marshall and Blackmun joined Justice Brennan in a concurring opinion based on the rationale that the rights at issue were "public rights" and, thus, properly considered by a non-Article III court. *Id.* at 594-601.

[112] 478 U.S. 833 (1986).

[113] *Schor*, 478 U.S. at 835-36.

[114] *Id.* at 852. The Court reasserted its position that any inquiry into the Constitutionality of a non-Article III adjudicative body is to be "guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.' " *Id.* at 848 (citing *Thomas*, 473 U.S. at 587).

[115] *Schor*, 478 U.S. at 848.

lute right and the Court found it had been waived under the peculiar facts of *Schor*.[116] In considering whether the tripartite scheme of government was threatened by the challenged activity, the Court weighed certain "factors."[117] The Court acknowledged that it had "declined to adopt" formalistic principles and that its consideration focused on factors which included "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercised the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."[118] Accordingly, the Court noted that the CFTC's powers were not impermissibly intrusive on those of Article III courts,[119] that appellate review was provided,[120] that the agency dealt with a specialized area of law[121] and involved a voluntary decision by the parties to invoke the jurisdiction of the CFTC.[122] The fact that the counterclaims involve state law claims did not deter the Court. It found, instead, that the extent to which the CFTC would be permitted to consider such claims over a narrow range was incidental to its primary unchallenged adjudicative authority,[123] and adopted the reasoning of Justice White in his *Northern Pipeline* dissent: "[T]here is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries."[124]

In *Schor*, the dissenting justices were reduced to only two, Justices Brennan and Marshall.[125] In his dissenting opinion, Justice Brennan argued emphatically against the course adopted by the majority. Brennan argued that the "important functions of

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[116] *Id.* at 848-50.

[117] *Id.* at 851.

[118] *Id.* at 851.

[119] *Id.* at 851-52.

[120] *Id.* at 853.

[121] *Id.* at 852.

[122] *Id.* at 855. This factor alone will not save the constitutionality of a non-Article III tribunal. *See* discussion *id.*

[123] *Id.* at 854.

[124] *Id.* at 853 (citing *Northern Pipeline*, 458 U.S. at 68 n. 20 (White, J., dissenting)).

[125] *Id.* at 859 (Brennan, J., dissenting).

Article III are too central to our constitutional scheme to risk their incremental erosion."[126] Even though adjudication by a non-Article III tribunal may be more convenient, "the Framers foreswore this sort of convenience in order to preserve freedom."[127] Furthermore, Brennan noted, that if administrative adjudication were all that convenient "it seems . . . that complainants would rarely, if ever, choose to go to district court in the first instance."[128]

Brennan worried that the Court was adopting a broad principle that would justify much more than the administrative adjudication of state law claims in the narrow range entertained by the CFTC.[129] He concluded by reminding the Court of its duties regarding separation of powers:

> Our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" be reposed in an independent Judiciary. It is our obligation zealously to guard that independence so that our tripartite system of government remains strong and that individuals continue to be protected against decisionmakers subject to majoritarian pressures. Unfortunately, today the Court forsakes that obligation for expediency. I dissent.[130]

It was in this state of the law that the *Coit* case was decided and the Hudspeth doctrine rejected, albeit on statutory grounds.[131] If it had considered the constitutional question,

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[126] *Id.* at 861 (Brennan, J., dissenting).

[127] *Id.* at 864 (Brennan, J., dissenting).

[128] *Id.* at 865 (Brennan J., dissenting).

[129] *Id.* at 865-66. Justice Brennan further stated:

> The Court dismisses warnings about the dangers of its approach, asserting simply that it does not fear the slippery slope. . . .A healthy respect for the precipice on which we stand is warranted, however, for this reason: Congress can seriously impair Article III's structural and individual protections without assigning away 'the *entire* business of the Article III courts.'. . . . It can do so by *diluting* the judicial power of the federal courts. And, contrary to the Court's intimations, dilution of judicial power operates to impair the protections of Article III regardless of whether Congress acted with the 'good intention' of providing a more efficient dispute resolution system or with the 'bad intention' of strengthening the Legislative Branch at the expense of the Judiciary.

Id. at 866 (emphasis in original)(citations omitted) (Brennan, J., dissenting).

[130] *Id.* at 867 (Brennan, J., dissenting).

[131] See *supra* notes 7 and 8. The constitutionality of the Hudspeth doctrine was

would the Court have upheld the doctrine and allowed FSLIC to adjudicate state law claims? I think the Court very well could have. By the time it reached its decision in *Schor*, the Court showed no discomfort with having state law claims adjudicated by administrative agencies where they might be considered "incidental" to the federally mandated function of the agency. The FSLIC argument regarding economic considerations and specialization would be consistent with reasons the Court had previously viewed favorably in allowing non-Article III adjudication. And, the Court assumed in *Coit* that judicial review of some sort would be afforded parties forced into the administrative process.[132]

Since *Coit*, the Court has turned back a Congressional scheme to give more adjudicatory authority over state law claims to bankruptcy courts.[133] In so doing, the Court addressed whether Congress could assign the adjudication of a private state law claim to a non-Article III, nonjury factfinder. In deciding this was not permissible, the Court again discussed public versus private rights and the formalistic rationale. But the author of the opinion, Justice Brennan, is retired now and the strong dissents of Justices White, O'Connor and Blackmun indicate the move towards functionalism will continue to be pressed,

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raised by Petitioner Coit. Coit argued that the doctrine allowing the FSLIC to determine state law claims violated Article III and the separation of powers doctrine. Additionally, Coit argued that such determination denied it access to an impartial tribunal necessary for due process and denied its right to trial by jury in violation of the Seventh Amendment. *See supra* notes 4-14 and accompanying text. *See also* R. Goodfriend, *The Demise of the Hudspeth Doctrine: Litigation with Receiverships after the Coit Case*, copyright 1989, p. 2, n. 1.(speech to the American Bar Association, October 6, 1989).

[132] The FHLBB apparently took the same view. Subsequent to the rejection of the *Hudspeth* doctrine in the *Coit* case, the Federal Home Loan Bank Board (FHLBB) sought legislative reversal of *Coit* and reinstatement of the Hudspeth doctrine. Proponents of the legislation granting adjudicative authority to FSLIC to decide state law claims referred to the Coit court's concern over the Constitutional question but argued that proper interpretation of the Supreme Court's functionalist balancing test would result in a favorable attitude towards such legislation. Memorandum of April 10, 1989, to the Senate Committee on Banking, Housing, and Urban Affairs, Attention: Raymond Natter, from American Law Division regarding Article III Objections to Agency Adjudication of State Law Issues, p. CRS2, Congressional Research Service, The Library of Congress. *See also* R. Goodfriend, *supra* note 131. The legislation was ultimately defeated.

[133] Granfinanciera v. Nordberg, 492 U.S. 33 (1989)(Brennan, J.).

at least insofar as the issues raised in connection with Article I courts or adjudication by administrative agencies. In taking the functionalist view, the Court adopts the notion that this is the "pragmatic" approach to take to such questions. However, "pragmatism," by definition, must relate to actual experience. To that matter, we can now turn.

III. North Mississippi Savings & Loan Association v. Hudspeth

A. The Underlying Facts[134]

In 1976, the unsoundness of certain savings and loan institutions in Mississippi led to a state-wide moratorium. At the time, Joseph M. Hudspeth was the President of North Mississippi Savings & Loan Association (Old North), an Oxford-based institution with branches in several north Mississippi towns.[135] To comply with the statutory scheme arising out of the moratorium, Old North sought federal insurance of its deposits with the FSLIC.[136]

The FSLIC agreed to insure Old North subject to two conditions. The first of these was a requirement that Old North increase the amount of its capitalization by $1.8 million. The second was that Old North agree to replace Hudspeth with a

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[134] Those facts set forth in this section appear in the affidavits of Joseph M. Hudspeth, W.L. Maxey, Will Hickman, and others, all of which are part of the Administrative record, unless otherwise specifically noted.

[135] Old North was a thriving institution and was not experiencing the problems that led to imposition of the moratorium. Testimony to that fact was the additional $1 million in deposits in Old North during the moratorium, i.e., during a time depositors lost any right to withdraw what they were placing in the association until the moratorium lifted.

[136] The Mississippi legislature implemented a number of statutes to control savings & loan institutions and prevent the reoccurrence of circumstances leading to the 1976 moratorium. *See* "Savings Association Law," Miss. Code Ann. §§ 81-12-1 through 81-12-207 (1972). Requiring effective means of insuring the safety of deposits was one issue addressed by the legislature. Miss. Code Ann. § 81-12-47 (1972). Obtaining federal insurance of deposits was just one of the options available to the savings & loan associations organized and doing business prior to the July 1, 1977 deadline, but it was the one most used.

Old North applied for federal insurance in June, 1976 and its application was approved in March, 1977. (Based on conversation with Joseph M. Hudspeth, April 8, 1991).

president chosen and approved by the FSLIC.[137] Both of these requirements presented certain problems for Old North, the solution of which resulted, ultimately, in the subject matter of *North Mississippi Savings & Loan Assoc. v. Hudspeth.* The first problem for Old North was that it required the services of Hudspeth to raise the needed capitalization—one of FSLIC's two requirements—at the same time that the FSLIC required that he be replaced.[138]

Negotiations between Hudspeth and Old North ensued. In December, 1977, an agreement was reached. Hudspeth agreed to give Old North the benefit of his good will, his promise not to accept employment with a competing savings and loan association, and his efforts in selling stock to reduce Old North's recapitalization debt of $1.8 million, during its critical transition period from an institution under the moratorium to a federally insured institution. In return, Old North promised to pay Hudspeth deferred income in the form of monthly payments and other consideration.[139] The terms of their agreement were initially set out in a resolution passed by the board of directors of Old North on December 29, 1977.[140]

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[137] The FSLIC's representatives claimed such a change was necessary because federal insurance created need for a person with "federal experience." According to Hudspeth, there may also have been an old score to settle since he had been the FHLBB's adversary in litigation several years before.

[138] To raise the necessary $1.8 million to meet the capitalization requirement of the FSLIC, Old North's Directors each personally guaranteed a $60,000 loan from People's Bank in Tupelo, Mississippi and/or Grenada Bank in Grenada, Mississippi. Collateral for each of these loans was an equivalent amount of stock in the association. As the stock was sold, the debt was retired. All of the directors had to realize that selling stock in a savings & loan association in Mississippi, one year out of the moratorium, was a difficult job at best. There was general agreement that Hudspeth was the only person reasonably available who had the reputation, contacts and salesmanship to do that job. Thus, Old North faced the problem of how to retain those services at the same time it was replacing Mr. Hudspeth with someone else of the FSLIC's choosing.

[139] In addition to a monthly stipend, Hudspeth received title to the company car he had been using, and was kept, along with his family, within the group insurance coverage for Old North.

[140] The resolution was signed by Charles Sullivan, chairman of the board of directors, and W. L. Watson, secretary to the board. Although the parties to the agreement intended to execute a formal contract, one was never signed. Charles Sullivan drafted the document but was killed in an airplane crash before delivering the contract to Hudspeth for his approval and signature.

Both parties to the "contract"[141] performed their obligations for several years. During that time, Hudspeth completed performance of the primary benefits Old North had purchased: he sold enough stock to assure Old North's recapitalization, and allowed Old North to represent to the communities it served that Hudspeth was an integral part of the institution and supported it. Old North made its monthly payments on schedule while Hudspeth was performing these obligations to it.

By 1980, however, significant changes had occurred which would lead to Old North's breach of its contract with Hudspeth and, ultimately, to the Hudspeth doctrine.

The first of these was the departure of Virgil Savoy, the federally-picked president who had replaced Hudspeth.[142] Within a few months, Savoy was replaced by Malcolm Reese, also a federally-recommended, FHLBB-approved officer.[143] From the very beginning of his tenure, Reese questioned the agreement with Hudspeth and the payments being made to him by Old North.[144] With the principal participants in formulating the contract—other than Hudspeth himself—no longer living, Reese had a freer hand in challenging the contract's validity.[145] Finally, Reese hired counsel for Old North and brought a declaratory action in the Chancery Court of Lafayette County, Mississippi

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[141] While I refer to Hudspeth's agreement with Old North as a contract and am of the opinion it was, it should be noted that this was a matter in dispute in *Hudspeth*.

[142] Savoy had been the primary negotiator of Hudspeth's contract and the one who assured Hudspeth the contract had the FHLBB's approval. Savoy left the employ of Old North in early 1978.

[143] Reese was hired in the Summer, 1978. Later that same year, Savoy was killed in a commuter airplane crash. In the Spring of 1979, Charles Sullivan, Chairman of Old North's board, was also killed while piloting his own small airplane.

[144] During this same time, the Federal government later charged Reese was engaged in improprieties regarding his conduct as President. He subsequently was sentenced to a correctional facility for certain of these acts. *See* Judgment and Probation/Commitment Order, United States v. Reese, United States District Court, Northern District of Mississippi, No. CRW84-5-WK (Aug. 23, 1984).

[145] At the time, Reese claimed that the contract was being challenged not by him, but by the FHLBB auditor who routinely examined the books of the association. The auditor *was* questioning the acceptability of the contract but, Hudspeth and others believed, only at the urging of Reese. The Board and Hudspeth maintained the contract had the prior approval of the FHLBB, because of representations to that effect by Savoy. Savoy, however, was no longer alive to confirm that fact and his presidential correspondence and papers were in Reese's possession.

seeking the invalidation of the contract.

B. The Pertinent Statutes

During the time that these events were occurring in Mississippi, the United States Congress was considering passage of certain amendments to statutes governing the Federal Home Loan Bank Board (FHLBB) and the FSLIC.

Prior to 1968, and under the Bank Protection Act of 1934, state courts had controlled the appointment of receivers of state-chartered savings and loan associations such as Old North. Although FSLIC could be appointed by the appropriate state authorities, the FHLBB had no authority to impose such an appointment, or to exercise control over the receivership.[146]

Following a series of savings and loan association failures in the mid-60's, during which the FSLIC purportedly suffered losses due to lack of cooperation from state officials, the FHLBB sought additional authority to act in this area.[147] As a result, Congress passed the Bank Protection Act of 1968,[148] which permitted the FHLBB to appoint the FSLIC as a federal receiver of a state-chartered association.[149]

In 1982, FSLIC secured passage of amendments to the Act permitting the FHLBB to appoint the FSLIC as sole federal receiver, subject only to the regulation of the FHLBB.[150] Under the same provision, the FHLBB could "federalize" a state-appointed FSLIC receiver as well.

Under the Act, as amended, the FHLBB-appointed receiver is granted power to conduct specified receivership activities "subject only to the regulation of the Federal Home Loan Bank Board."[151] Suits to oust the receiver may be entertained in the

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[146] *See* S. Rep. No. 1482, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3532 (legislative history of 12 U.S.C. § 1464(d)(6)(C)).

[147] S. Rep. No. 1263, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2535-38.

[148] 12 U.S.C. §§ 1729, 1881-1884 (1982 & Supp. 1986) (§ 1881-1884 subsequently amended Supp. 1991).

[149] 12 U.S.C. § 1729(c)(2), (c)(3) (1982 & Supp. 1986).

[150] *See* 12 U.S.C. § 1729(c)(1)(B). *See also* S. Rep. No. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3054; 78 CONG. REC. H11192 (daily ed. June 12, 1934).

[151] 12 U.S.C. § 1729(d) (1982 & Supp. 1986) (subsequently amended Supp. 1991).

district court.[152] Otherwise, "no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the FHLBB, restrain or affect the exercise of powers or functions of a conservator or receiver."[153]

Following the 1982 amendments, FSLIC took the position that, as receiver, it had *exclusive* jurisdiction to decide claims against a state-chartered institution, even those pending in court prior to the existence of the receivership.[154]

C. The Proceedings in Chancery Court

On August 18, 1982, Old North, under the direction of Malcolm Reese, brought a declaratory action in the Chancery Court of Lafayette County, Mississippi, to void its contract with Hudspeth.[155] Hudspeth counterclaimed for the full value of the contract, which he contended had already been substantially performed.[156] By agreement between counsel for the parties, Old North agreed to continue its contractual payments during the course of the lawsuit.[157] In return, Hudspeth agreed not to ask for punitive damages.[158]

During the course of discovery, Old North refused to respond to certain interrogatories, request for production of documents, and requests for admission. Motions to compel were filed, with oral argument and, then, briefs to the chancery court.[159]

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[152] 12 U.S.C. § 1464(d)(6)(A) (1982 & Supp. 1986).

[153] 12 U.S.C. § 1464(d)(6)(C) (1982 & Supp. 1986).

[154] *See supra* note 4.

[155] In the suit, Old North attached the December, 1977, resolution and asked the court to adjudicate rights and obligations of the parties under this "contract" between them. It also asked the court to declare the contract to be null and void. North Mississippi Savings & Loan Assoc. v. Hudspeth, No. 82-367, Chancery Court of Lafayette County, Mississippi.

[156] Hudspeth asked $160,000.00 for the value of the contract, plus additional damages in the amount of $50,000.00.

[157] These included paying the monthly stipend to Hudspeth and, also, paying the premiums necessary to keep Hudspeth under a group medical benefits plan with New North.

[158] Because claims for punitive damages were not entertained by Mississippi Chancery Courts at that time, Hudspeth had omitted that claim from his counterclaim. The possibility of a transfer to Circuit Court, where punitive claims could be entertained, was a factor in obtaining the litigation agreement with Old North.

[159] Hearing before the Chancellor was conducted in December, 1982. Briefs elaborat-

The court ruled in favor of Hudspeth on April 8, 1983, ordering Old North to produce all the documents requested and answer Hudspeth's interrogatories and request for admission. Three days later, on April 11, 1983, the FSLIC petitioned the Chancery Court for appointment as receiver for Old North. When that appointment was obtained, the FHLBB immediately "federalized" the receivership by appointing FSLIC as sole receiver for Old North. A federally chartered savings and loan, New North Mississippi Federal Savings & Loan Association (New North), was formed to assume the assets and liabilities of Old North, with the transfer effected immediately.[160]

On the day of appointment, the FSLIC receiver took its first step to eliminate the Hudspeth claim. Hudspeth received notification by mail that "all employment, severance, noncompetition, consulting or other compensation contracts" between Hudspeth and Old North were "terminated" as of that date.[161] Subsequently, neither Old North nor New North made the contract payments to Hudspeth as they became due.[162]

Because Old North had defaulted on its payments, and because virtually all of the assets of Old North appeared to have

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ing on the arguments there were submitted by both parties on January 15, 1983.

[160] All of Old North's assets and liabilities were transferred to New North with one major exception: the Receiver claimed that the liabilities for Hudspeth's claims were "left behind" with Old North, which no longer had any apparent assets. As it turned out, there were assets still in Old North, overlooked by the Receiver. Old North had been involved as a Plaintiff in litigation prior to the receivership against another s&l and had received a judgment. Hudspeth had been a principal witness for Old North in this litigation.

[161] The Receiver's second step to dispose of Hudspeth's claim was to file a Motion to Dismiss his counterclaim for lack of subject matter jurisdiction and, alternatively, for Summary Judgment. The Motion was filed on June 27, 1983. The chancery court entered its order denying the Motion on September 15, 1983.

[162] Apart from the terms of the contract claimed by Hudspeth there was, of course, the litigation agreement described earlier. That agreement had been reached as a result of negotiations between counsel for Old North and Hudspeth's attorneys. Counsel for Old North, however, were discharged when the FSLIC became Receiver and new local counsel obtained. The original attorneys filed their Motion for Leave to Withdraw as Counsel. Hudspeth resisted on the basis of the litigation agreement and subsequent counsel's refusal to honor it. FSLIC did arrange for Hudspeth to continue under group insurance coverage until he turned 62, as provided by his original agreement with Old North. In so doing, FSLIC was apparently hedging its bets. If Hudspeth's claims were upheld, the expense in reinstating the insurance benefits would be unacceptably high and the expense in maintaining his participation in group coverage was nominal.

been transferred to New North, Hudspeth amended his counterclaim to reflect these facts and to bring in New North as a "transferee in interest" in accordance with Mississippi Rules of Civil Procedure 25(c).[163] Shortly thereafter, New North and the FSLIC as receiver of Old North petitioned for removal to the United States District Court.[164]

D. Proceedings in the United States District Court

In the district court,[165] FSLIC moved to dismiss Hudspeth's amended counterclaim and Old North's original declaratory complaint or, alternatively, for summary judgment. Hudspeth responded and, also, filed a motion for remand, citing the "proviso" of 12 U.S.C. § 1730(k)(1).[166]

New North and the FSLIC took the position that the "proviso" of § 1730(k)(1) and traditional receivership law do not ap-

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[163] Hudspeth's claim against New North was, thus, based on the law of Mississippi regarding the transfer of liabilities with assets. Because the litigation agreement had been breached and because Chancery practice had changed to allow same, Hudspeth also reinstated his claim for punitive damages, arguing Old North had purposely waited until his performance was complete before defaulting.

[164] Hudspeth filed his Amended Counterclaim on October 12, 1983. The petition for removal was filed on October 21, 1983. Inasmuch as that removal was ultimately upheld, even on appeal, and since the petition was only possible because of the amendment to the counterclaim, the question should be asked whether Hudspeth should have adjudicated his claim first against Old North in chancery court and, then, sought to execute it against the assets of New North? At the time, counsel for Hudspeth amended the counterclaim and joined New North to avoid multiple litigation. Since New North had all of the assets of Old North, it would have to be sued at some point and there appeared no particular reason to go through two suits rather than one. If Hudspeth had succeeded in establishing his state claim in chancery court, however, he might have had a firmer claim on the assets of New North in a subsequent suit and, perhaps, a basis for avoiding relegation of his claim to the exclusive jurisdiction of FSLIC. *See, e.g.*, FSLIC v. Kennedy, 732 S.W. 2d 1 (Tex. Ct. App. 1986)(FSLIC could not readjudicate claims after already determined by final judgment).

[165] North Mississippi Sav. & Loan Ass'n v. Hudspeth, United States District Court, Northern District of Mississippi, Western Division, Civ. Action No. WC 83-193-WK-P (March 12, 1984).

[166] This statute specifically provides for adjudication in state court of state law claims against state-chartered associations under an FSLIC receiver. In its opinion in *Hudspeth*, the Fifth Circuit found the proviso inapplicable because the rights and obligations of New North, a federal institution, were involved. *Hudspeth*, 756 F.2d at 1100-01. Under that interpretation, of course, the proviso would virtually never have effect when the FSLIC was appointed Receiver.

ply to "federalized" FSLIC receivers. Rather, they claimed, the BPA, as amended, and § 1464(d)(6)(C) grant the FHLBB exclusive jurisdiction to adjudicate the validity of any claims against the association in receivership, even those pending in state or federal court prior to the existence of the receivership, and based on state law.

The district court denied Hudspeth's motion for remand and dismissed his counterclaim, finding that under 12 U.S.C. §§ 1464(d)(6)(C) and §§ 1729, the FHLBB had exclusive jurisdiction over Hudspeth's claims.[167] The district court also dismissed Old North's original complaint for mootness, stating that the receiver's termination of the subject contract had ended any need to determine its validity.[168]

E. Proceedings in the United States Court of Appeals for the Fifth Circuit

On appeal, a unanimous panel of the Fifth Circuit[169] affirmed in part and reversed in part. The panel reversed the district court on the critical issue of adjudication and held that Congress had given no such exclusive grant to the FSLIC:

> Nothing in the relevant statutes or legislative history indicates that the FSLIC has the power to adjudicate claims . . . .
> . . . [If] an action is based on the pre-receivership conduct of the failed institution, the debt due may be judicially established. . . .
> . . . Therefore, Hudspeth's demand for judicial establishment of Old North's obligation to him, should he wish to proceed with it, should be remanded to state court.[170]

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[167] *Hudspeth*, Civ. Action No. WC 83-193-WK-P, Memorandum Order, March 12, 1984 (Keady, J.).

[168] *Id.* Hudspeth's Motion to Reconsider was denied in the court's order of April 17, 1984.

[169] The panel consisted of Justices Reavley (presiding), Higginbotham, and Thornberry.

[170] *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, No. 85-294, slip. op. at 3485, 3486-87 (5th Cir. Apr. 5, 1985), *reh'g granted*, 756 F.2d 1096 (1985). This initial opinion of the Fifth Circuit no longer appears in the Federal Reporter. However, a copy of the decision in its entirety is reprinted in Petition for Writ of Certiorari, Appendix B, *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986)(Docket No. 85-294).

The FSLIC lost on the point it deemed most important and immediately sought rehearing. On Petition for Rehearing, the FSLIC argued that the Fifth Circuit's decision would cause economic harm to the FSLIC because of the delays encountered in adjudicating claims in state courts. Specifically, it contended that:

> Under the Court's ruling, adjudications of these claims may be inordinately delayed because damage claims against the receivership estate could be presented to state or federal courts, instead of to the receiver, for initial adjudication of their validity. . . .Under this scheme, many claims filed in 1985 might be resolved ultimately in the next century.[171]

If Mr. Hudspeth had only begun the administrative process in April 1983, the FSLIC further noted, "it is likely that his claim would already be resolved."[172]

FSLIC's second assertion to justify rehearing was that, contrary to the Court's initial holding, there was legislative history supporting adjudicatory power for the FSLIC.[173]

Without permitting a response brief from Mr. Hudspeth,[174] the Fifth Circuit revised its opinion. On May 23, 1985, the Court granted the Petition for Rehearing and issued its revised opinion now appearing in the Federal Reporter.[175]

In support of its revision, the Fifth Circuit relied on two premises which do not appear in its original decision. First of all,

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[171] Plaintiffs-Appellees' Petition for Rehearing, at pp. 11-12, 756 F.2d 1096 (footnote omitted).

[172] *Id.* at 12 n.7. This point was also made at oral argument by Paul Grace, lead counsel for the FSLIC.

[173] *Id.* at 7-8.

[174] The economic argument and facts supporting it were not part of the record and had not been raised previously. The argument based on legislative history was demonstrably false. The FSLIC cited the 1968 history of the Bank Protection Act, whereas the histories pertaining to the statutes in issue were those found in S. Rep. No. 1482, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532 and S. Rep. No. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054. Local rules of the Fifth Circuit (and virtually all Circuit Courts of Appeal) do not permit a response to a Petition for Rehearing absent a specific request by the Court. Nevertheless, it is regarded as unusual for the Court to revise an earlier opinion on the basis of such a Petition without asking for a response.

[175] North Mississippi Sav. & loan Ass'n v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985).

it changed its earlier view and accepted the contention that legislative history supported the grant of adjudicatory authority. That premise was incorrect.[176] Second, the court relied on its assumption that allowing the FSLIC, as receiver, to adjudicate claims would expedite claim resolution as well as the disposition of receiverships:

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: The FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as Receiver, such a delay is a "restraint" within the scope of the statute.[177]

F. The FSLIC Adjudication of the Hudspeth Claim

The Fifth Circuit's revised opinion placed Hudspeth squarely in FSLIC's administrative process. The basis of the opinion was *not* "exhaustion of administrative remedies," but rather that FSLIC alone had authority to adjudicate Hudspeth's

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[176] Specifically, the Court relied on the 1968 history of the Bank Protection Act. *Id.* at 1101 (citing S. Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539). That history, however, was not the correct history for the determination of the Congressional intent underlying 12 U.S.C. §§ 1464(d)(6)((c) and 1729(d). The legislative histories pertaining to the enactment of those statutes, in the amended versions considered by the Court, appear at S. Rep. No. 1482, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532 and S. Rep. No. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, respectively. *See also* 78 CONG. REC. H11192 (daily ed. June 12, 1934). Neither of the pertinent histories supports grant of adjudicatory power to the FSLIC, as Receiver. Hudspeth identified the Fifth Circuit's mistake in this regard in his subsequent petition to the United States Supreme Court. *See* Reply Brief of Petitioner, On Petition for Writ of Certiorari, at p. 3, *Hudspeth.*

[177] *Hudspeth*, 756 F.2d at 1102. The argument that such violated Article III and the separation of powers doctrine was made in Hudspeth's appeal to the Fifth Circuit. It was not the main thrust of the argument, inasmuch as the lack of statutory mandate appeared evident. The Constitutional argument was not addressed by the Fifth Circuit. In its first opinion, there was no need, as it reversed on the basis of lack of statutory mandate. When it revised its opinion, it did so on the same basis, and never went back to consider other arguments, including the Constitutional one, that it had not had to reach for the first decision.

state law claims against the receivership. Hudspeth's was the first such claim to be considered by the FSLIC.[178]

As the first step in the administrative process, Hudspeth submitted a "proof of claim" on November 27, 1985.[179] As instructed by the form, the claim was forwarded to the attention of Mr. John Sears, Claims Representative. On December 4, 1985, Mr. Hudspeth wrote Mr. Sears requesting a hearing on his claim before any final determination was made. He received no response and no hearing was ever conducted.

The next communication Mr. Hudspeth received regarding his claim came almost seventeen (17) months later. On May 1, 1987, the receiver issued its "Notice of Record." Attached to the Notice was an index of the three-volume administrative record that had been compiled.[180]

Volume 1 of the record consisted of the materials submitted by Mr. Hudspeth in November 1985 in his initial submission of his claim. Volume 2 contained four summaries of interviews apparently conducted by the FSLIC or its representatives after Hudspeth filed his claim with the agency. Those interview summaries account for only six pages of the record. Otherwise, Volume 2 consisted of letters, notes and reports from the files of North Mississippi Savings & Loan Association, most of which had been produced in 1982 and 1983 during the course of discovery in the state court proceedings. Volume 3 of the record consisted entirely of state court pleadings from both *Hudspeth* and the proceedings establishing the FSLIC's receivership of North

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[178] Hudspeth's claim was given the number 00-001-0001 and, I was told by the agency's counsel in Washington, the claims subsequent to his that were brought before the FSLIC under the Hudspeth Doctrine were called "Hudspeth claims." An outline of the administrative procedure ultimately used for disposition of these claims is set forth in Baxter, *supra* note 4, at 461-72.

[179] Under protest, Hudspeth was required by the Receiver to submit his claim before the subsequent disposition of his Petition for Writ of Certiorari on January 13, 1986. The "proof of claim" form was mailed to Hudspeth without any other procedural or evidentiary guidelines by FHLBB attorney, Paul Grace. Grace had served as lead counsel arguing Appellees' position against Hudspeth in oral argument in the Fifth Circuit. As such, he had noted his own view in argument that Hudspeth's contract was "just an employment contract," and, thus, terminable at will by FSLIC.

[180] This index is part of the Administrative Record compiled in Hudspeth's claim No. 00-001-0001. It remains available for inspection at the Federal Home Loan Bank Board, 1700 G Street, N.W.—4th floor, Claims, Washington, D.C. 20552.

Mississippi Savings & Loan Association.

Thus, with the exception of four rather short interviews, all of the material in the record designated in May 1987 was available, and accounted for, when Hudspeth filed his claim in November 1985, one and one-half years before.

With permission from the Receiver, Mr. Hudspeth filed his supplementation of the Administrative Record on July 2, 1987, acknowledged by the Receiver on July 6, 1987. Almost six months then passed with no further contact from the FSLIC. Finally, on December 24, 1987, the Receiver issued its "Notice of Proposed Determination," disallowing Hudspeth's claim in full.[181]

On March 3, 1988, Hudspeth filed a Request for Reconsideration.[182] At the same time, Hudspeth wrote Sears, asking again for a hearing on his claim. He further noted that he had requested, but never received any sort of written procedures, rules or regulations as a guideline in submitting his claim. Sears responded on March 7, 1988, by forwarding a copy of *Procedures for the Administration and Determination of Claims Filed with the Receiver.*[183]

Thus, in May 1988, two and one-half years after Hudspeth began the administrative "adjudication" that the Fifth Circuit assumed would avoid delay, the Receiver had not yet issued even its "Initial Determination." Had Hudspeth's state law claim against Old North been left in state court, there is no question it would have been completely resolved long before this time. In April 1983, discovery in the state court proceedings was

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[181] Attached to the notice was a fifteen-page document in the nature of a "Findings of Fact and Conclusions of Law." The document was entitled "Proposed Determination," and signed by Mr. Sears as Special Representative for the FSLIC Receiver.

[182] Hudspeth had asked for, and received an extension of the time provided for submitting this Request from January 24, 1988 until March 4, 1988. Attached as exhibits to his request were Mr. Hudspeth's "Objections to Findings of Fact in Receiver's Proposed Determination" (ten pages) and his "Proposed Alternative Determination" (thirty-five pages).

[183] A later comparison of the procedures sent with those published in the Federal Register shortly thereafter showed the copy sent by Sears to be different from those actually adopted. *See Appendix-Procedures for the Administration and Determination of Claims filed with the FSLIC as Receiver, Conservators and Receivers: Interim Procedures*, 53 FED. REG. 13105 (1988).

near completion. The Lafayette County Chancery Court in Oxford, Mississippi, did not suffer from a congested docket. A trial setting for the Summer of 1983 or early Fall was a certainty. Even had that court's judgment been subsequently appealed and, giving the Mississippi Supreme Court three years to resolve the appeal, such an appeal would have reached resolution long before 1988.[184]

G. The Resolution of Hudspeth's Claim

The United States Supreme Court declined to consider the Hudspeth Doctrine in the *Hudspeth* case.[185] At first, the doctrine was applied consistently by the Fifth Circuit, and other circuits followed the Fifth Circuit's lead.[186] Finally, the Ninth Circuit refused to apply the doctrine.[187] Following the Ninth Circuit's ruling, the next case up in the Fifth Circuit was *Coit*. The Fifth Circuit applied the Hudspeth doctrine and Coit petitioned for certiorari, citing the conflict between the circuits. On May 18, 1988, already having been in the administrative process for years, Hudspeth elected to file an Amicus Curiae Brief in the *Coit* matter.[188] On or before July 18, 1988, before oral argument was heard in *Coit*, the FSLIC and Hudspeth reached agreement on a compromise settlement of Hudspeth's claims.[189] Hudspeth

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[184] In his analysis of the administrative adjudcatory process, Lawrence Baxter suggests that Hudspeth's experience with FSLIC may have been an "exception," due to FSLIC's inexperience. Baxter, *supra* note 4, at 530. However, Baxter subsequently acknowledges that delays in processing claims continued to be a problem. *Id.* at 530-31. Due process, of course, requires more than the speedy determination of claims, in any event. *See infra* Lesson no. 2.

[185] North Mississippi Sav. & loan Ass'n v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

[186] *See supra* note 4.

[187] *See supra* note 4. One member of the Ninth Circuit's three-judge panel rejecting the doctrine was Anthony Kennedy. Kennedy was sworn in as Justice of the United States Supreme Court in 1988, just in time to consider the *Coit* decision.

[188] Hudspeth's Brief was filed by permission of both Coit and the Solicitor General.

[189] One apparent reason the FSLIC sought to settle the Hudspeth matter before oral argument in *Coit* was to be able to say it had, at least, finally resolved the very first claim it had taken under the auspices of the Hudspeth Doctrine. In fact, during oral argument, this point was made to the court by the government counsel. It did not have the desired effect. Several of the court's members sat back smiling with Justice Scalia saying out loud what others appeared to be thinking: "So what does that mean? That, after all this time, you finally wore him down?" Personal recollection of author of com-

finally was compensated, if only in part, for the services he had provided. That compensation came over five years after the FSLIC had become involved in the claim.

IV. The Lessons of the Hudspeth Doctrine

There may be some who are unconcerned by the course of the *Hudspeth* case and the subsequent application of the Hudspeth doctrine. If so, they need read no further. My own view, however, is that Hudspeth's experience was a long nightmare of injustice and that the principal problem was the FSLIC being "judge in its own cause."

At no time during the course of Hudspeth's controversy with, first, Old North and, second, the FSLIC, were the merits of his claim for compensation arising out of Mississippi contract law ever considered by either a state court or a federal Article III court. Instead, Hudspeth's claim was, first, denied by the FSLIC receiver in "terminating" his "employment," then opposed for two years throughout the jurisdictional controversy. It was then considered by the very same agency on its merits and—to no one's surprise by that time—denied again. Only when the FSLIC saw gain to itself from doing so was any favorable consideration given to Hudspeth's claim.

At the least, Hudspeth was denied a hearing on the merits of his claim, he was denied timely consideration of his claim, he was denied a hearing by an impartial tribunal and, in the final analysis, all of these joined to deny him the fruits of his contract. If his claim had been allowed to proceed in state court, he may also have been denied any benefits from the contract in issue. However, he would have had his "day in court" and that makes all the difference in my view of the situation.

Hudspeth's ordeal and the FSLIC's implementation of the Hudspeth doctrine, nevertheless, have value. They yield particular lessons. They are concrete reminders of the importance of the separation of powers doctrine to the American democracy and they strongly suggest that the high Court's recent analysis of separation of powers issues is unsatisfactory.

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ments made during *Coit* oral argument, November 1, 1988.

LESSON NO. 1: *The reasons that supported the separation of powers in the eighteenth century, and before, still exist today.*

Our founders wisely recognized, and provided protections against, certain characteristics of people governing other people. The structure of government they selected was of fundamental importance in making ours a government of laws, not of persons. There has been no change in human nature—no evolution of our characters—that rids us of the need for these protections.

A. *People still cannot be trusted not to abuse unchecked power.*

The truth of this statement should not come as a surprise. In the last twenty years alone, America has endured Watergate, the Iran-Contra scandal, the Wall Street inside-trading crimes, and allegations of influence-peddling by United States Senators, to name only a few. Under the venerable "cockroach" theory, there are probably ten other abuses of power for every one that is made public. People bear watching. They always have and they will for the foreseeable future.

The events of *Hudspeth* are testimony to this truth.

B. *The judicial power should still be exercised by those most independent of influence by political or economic considerations.*

In *Hudspeth*, one of the FSLIC's principal arguments for granting adjudicatory authority to it was its lack of funding.[190] The conflict of interest inherent in the same agency's adjudicating the merit and value of Hudspeth's contract claim which the agency, as insurer of the insolvent institution, would likely have to pay is obvious.

The notion that judicial review, *de novo* or otherwise, by an Article III court is a sufficient check on any bias of the agency's "court" is simply wishful thinking. It is just as likely that many claimants are "worn down" during the lengthy administrative proceedings and never reach consideration of their claims by an

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[190] *See supra* notes 166-73.

impartial tribunal. Those that do reach judicial review are not afforded the same type of consideration that would have been given to the same claims prosecuted in a court of law. It may be that the proper functioning of government requires the sacrifice of some individual's rights to an impartial assessment of their claims. If so, that reason is the one that should be given, not that the adjudication by the agency is sufficiently "checked" so as to be effectively impartial when, in fact, it is not.

C. *The judicial branch of government still, more than the other two, must remain independent.*

This is the same thought, viewed from the other direction. The intent of the founders was that the branches be separate, recognizing that the executive and legislative branches would require interdependence and some overlapping of function. Of the three branches, however, the judiciary most especially was to be independent and separate.[191]

The Hudspeth doctrine illustrates why this view is still a good one and one that ought to be honored by the Supreme Court. Under an independent judiciary, Hudspeth's rights and claims are no more, no less than those of say, General Motors. Parties are treated even-handedly and, while a difference in economic clout may have an impact on the scope of representation one can afford, it does not change the basic rules and procedures which apply equally to all parties regardless of their financial worth or political power. Under the administrative process used in the Hudspeth doctrine, however, the parties were not on equal footing. Hudspeth was still just an individual claimant. But his claim was being judged by a party who might end up paying the claim. Further, that party was also making up the rules under which the claim could be made and evaluated.

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[191] This goes both ways of course. We have not discussed the proscription against judges engaging in nonjudicial acts, but this deserves equal emphasis in applying the separation of powers doctrine. *See, e.g., Supreme Court 1988 Term*, 103 HARV. L. REV. 40, 279-90 (1989)(criticizing the participation of judges in an essentially legislative body with legislative purposes); Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193 (1953); Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993 (1986) (authored by Wendy E. Ackerman).

All administrative adjudications are not, of course, structured in the same way as the FSLIC's under the Hudspeth doctrine. But a common thread in any adjudication by a non-Article III federal entity must be the presence, somewhere, of an "agenda"—the purposes of the agency itself. To the extent the agency is readily controlled by the President or incumbent political powers in the Executive branch, its purposes reflect the political climate of the moment. To the extent the agency has obtained an "institutional" status, semi-independent of any political party, it still has a raison d'etre, its own purpose in being. My point is this: it would be most surprising if any of these purposes, even the most commendable ones, were always compatible with securing a fair and just adjudication of a particular individual's claim.

One of the essential purposes of the *judicial* branch, however, is to resolve controversies between individuals in a fair and just manner. In order that it might serve its purpose, therefore, it must remain independent of the other branches, and their subordinates, who have other, conflicting purposes.

Lesson No. 2: *"Efficiency and economy" are suspect as reasons to dispense with the separation of powers.*

There are many more people today than there were in the late 18th Century. The greater the population, the greater the strain put on our governing institutions, including the judiciary. While the size of the judiciary has increased, it is common knowledge that its capacities have not kept pace with the population nor the increasing complexity of the matters brought before it. Thus, circumstances are created which are conducive to funneling the courts' work elsewhere on grounds of "efficiency" or "economy." The complexity of matters presented to the courts also creates an environment conducive to taking problems from "impartial"—read "unknowledgeable"—courts and giving them to the "authorities" who deal with these day in and day out. The application of the Hudspeth doctrine demonstrates that these assumptions are not necessarily good ones.

If efficiency is offered as a basis for assigning adjudicatory authority to any entity other than an Article III court, the first question that should be asked is this: "Is the requested function

more efficient simply because the judicial system is not sizeable enough?" If the answer is "yes," the power should not be given. To do otherwise would be tantamount to permitting the legislature to dilute the power of the judicial branch of government by underfunding it.

The next question that must be asked of any such attempted justification by efficiency is whether the non-Article III adjudication suggested would truly be more efficient? *Hudspeth* demonstrates the distinction between *claiming* increased efficiency and *proving* increased efficiency. Courts have, I believe, been too quick to accept the criticism of inefficiency in their handling of claims. I suspect that, many times, such criticism is actually an objection to the time necessitated by procedural and evidentiary safeguards for the rights of the adversaries. Certainly, removing these safeguards will, theoretically, allow for speedier determination of claims. But, as the application of the Hudspeth doctrine demonstrates, that does not mean the determination will, in fact, be speedier. And, a process without those safeguards Article III Courts consider necessary "to secure the just, speedy, and inexpensive determination of every action"[192] is, at the least, more likely to not to be just, speedy or inexpensive.

LESSON NO. 3: *The "balancing" test for determining violation of the separation of powers doctrine is not sufficient to maintain a balanced tripartite government.*

The problem with balancing, at least in regard to separation of powers questions, is that it usually requires the court to weigh a concept against a crisis. Very few of us (God and Walter Lippman are the only potential candidates who come to mind) are able to employ the sort of universal perspective that permits fair balancing of the abstract against the concrete. Short term crises,

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[192] FED. R. CIV. P. 1. *See also* FED. R. EVID. 102:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Id.

such as those faced by the FSLIC and the savings and loan industry, are closer in view and will naturally be accorded more weight than the abstract requirements of separation of powers.[193] They should not be, however, if we are going to maintain the separation of powers. For that reason, balancing is not a good tool for assessing separation of powers violations, especially Article III violations.

LESSON NO. 4: *Due process requires the recognition and honoring of the separation of powers.*

When one of the branches of government violates the principle of separation of powers, it necessarily violates "the law of the land." Therefore, it also violates the requirements of "due process."[194] Due process, at the minimum, requires that an individual's claim, e.g., be evaluated within a structural framework consistent with the Constitution. Given that the separation of powers doctrine is recognized as a requirement of the Constitution, then any framework violating that doctrine cannot afford due process. It matters not that a particular claim is evaluated correctly within such a framework. It is the process, not the result, that is at issue. I may decide your claim by flipping a coin and my decision may be consistent with justice being done. But my method is deficient and I have not afforded you due process. The reason is this: using my method provided no structure to the process which would tend to produce the just result; obtaining a just, rather than an unjust, result was simply a matter of chance. This explains why attempts to "fix up" the administrative adjudication process are misguided. Unless such repair goes all the way to making the agency courts Article III courts, it is arguably an attempt to take the minimum needed steps to reduce criticism of the court's activities. That is a result-oriented solution and it does not eliminate the violation.

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[193] This is essentially the same point made by Justice Brennan in his dissent in *Schor*. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952)(Frankfurter, J. concurring)("The accretion of power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.")

[194] *See supra* notes 57-71 and accompanying text.

V. Conclusions

The separation of powers is not a legal "nicety" no longer strictly necessary in our "information" age. The notion that we are "all adults" who can treat government like a business is attractive but very dangerous. The founders of American government may not have originated the philosophical ideals they used in forming the United States, but they showed remarkable judgment and understanding of human nature in choosing the Constitutional framework and rules that they did.

The present standards for applying the separation of powers doctrine are inadequate to protect this framework. How should they change? At the very least, the standards should become more specific. Having a vague, general standard for applying a vague, general doctrine will lead to the trivialization and ultimate demise of that doctrine. This is particularly true where the arguments divide in the way they do on almost any separation of powers battle. In favor of finding no violation is the party arguing efficiency, economy, and the obsolete nature of the barrier posed by the doctrine. This has a lot of appeal in a country such as the United States—one very concerned about moving fast, reducing costs and being "up to date." The proponent of finding the violation, on the other hand, is generally reduced to two arguments, neither of which have very much appeal for us. The first of these is based on technical analysis of the proposed action as to its character as, e.g., a judicial act. The second is an appeal to the intents and purposes of our founders. The latter argument appeals to, in effect, distrust of one's fellow human beings and we are uncomfortable with embracing that as a philosophy of decision.

A further complication is that judicial precedent, generally an important tool for any argument to the Court, is not very helpful in evaluating separation of powers issues. Because the doctrine has never been consistently applied and the standards for application have remained vague and undefined, circumstances are more favorable for finding that encroachment has not occurred, regardless of the actual merits of the case being considered. The existence of more specific standards in this area levels the playing field somewhat.

What should the elements be for a more specific standard?

They should start with the formalist's position, allowing the three traditional exceptions. Any departure from these categories would impose a heavy evidentiary burden on the party seeking the departure to show that the departure will not tend to undermine the independence of the judiciary. Some triggers to increased scrutiny should be recognized. Any legislation which grants "adjudicative" authority to a governmental entity other than an Article III court should be automatically suspect and subjected to the strictest scrutiny. If the activity is both one most accurately characterized as "interpreting the law," as well as one historically assigned to the judiciary, then any claim to conduct such activity by one of the other branches should be repudiated. If the activity is "interpreting the law," but it is one that has, in the past, been conducted by the other branch, the level of scrutiny could be lowered and, perhaps, the presumption against such conduct dropped. Further, when efficiency and economy are raised as reasons for allowing, e.g., an administrative agency to exercise the judicial power, the party so urging ought to have the burden to prove by clear and convincing evidence that the suggested function would actually be more efficient and/or economical and that the procedure to be used would not deny the claimants due process of law.

Whatever is done to make the standard more specific, however, ought to accord the separation of powers doctrine at least the same claim to thoughtful reflection and statement of specific guidelines as, e.g., individual rights.[195] It is not the privilege, but the duty, of each branch of government, including the judiciary, to preserve its independence and sovereignty over a designated area of functions.

It is a matter of presumptions, really. Should the Court routinely approve "quasi-judicial" activity by another branch of government unless there is some really good reason not to do so? Or should it zealously guard against such encroachment, requiring strict proof and compelling arguments before it will yield ground and, then, only the tiniest bit that is absolutely neces-

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[195] *See* R. NAGEL, CONSTITUTIONAL CULTURES 62-65 (1989) (criticizing Court's eagerness to discuss individual rights versus constitutional structure, even though the latter was of the most importance to framers of the Constitution).

sary? It must be the latter, if the separation of powers doctrine—the foundation of our government—is to survive. As the experience of the Hudspeth doctrine makes clear, it is important that it does.

THE CRIMINALIZATION OF FRATERNITY, NON-FRATERNITY AND NON-COLLEGIATE HAZING

*Dr. Darryll M. Halcomb Lewis**

Criminal hazing statutes throughout America do not effectively deal with the reality that hazing is a common occurrence in all segments of American life.[1] The practice of hazing is cruel and sometimes physically and mentally dangerous to those hazed.[2] Present criminal statutes are directed at fraternity hazing; however, they should criminalize hazing in other arenas that create a substantial risk of physical or mental injury to the hazee. Therefore, this paper explores the criminal aspects of hazing as applied to fraternal organizations as well as to non-collegiate, non-fraternity entities.

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[1] There is a current and ongoing debate concerning the civil liability of fraternal organizations for injuries incurred by their pledges during initiation ceremonies. Although that debate is beyond the scope of this work, the classic hazing-injury case involves a college student who has been injured while being initiated into a collegiate fraternal organization. The injured plaintiff commonly sues those personally involved and responsible for his or her injuries. Those organizations most commonly sued are the local chapter of a national fraternity, the national fraternity, and the host university. The model hazing-injury case comprises three primary issues: (1) whether the local fraternity chapter was negligent in injuring the initiate, (2) whether the national parent fraternity is civilly liable for injuries during initiation ceremonies conducted at the local level, and (3) whether there is a master-servant or principal-agent relationship between the national and local fraternity sufficient to impose vicarious liability. Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488, 489 (Ct. App. 1986); *see also* Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753, 755 (1985) (club held liable for initiate's injuries negligently inflicted during initiation ceremony).

[2] Chestnut, *To Eradicate College Hazing*, The Literary Digest, Nov. 25, 1933, at 30. The son of a Calgary attorney "was made permanently insane" by university initiation practices and a jury awarded $56,000 in damages. *Id.* Throughout this paper, those who are hazed may be referred to as a hazee, plebe, initiate, or novitiate.

I. The Origins of Hazing

"[T]he customs of a people are often stronger than their laws"[3] and hazing is an ancient custom[4] that has existed and continues to exist in many forms.[5] Although the practice of hazing is widely condemned,[6] its persistence is due to many factors.[7] The literature shows that hazing is not unique to fraternal organizations,[8] yet hazing by these groups seems to dominate the at-

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[3] Benjamin, *Concerning "Hazing" at the United States Naval Academy*, 52 The Independent 3099, 3101 (1900).

[4] Davidson, *Killer Hazing*, U.S. Reports, Sept. 29, 1981, at 54. Not surprisingly, hazing began in the brutal Middle Ages with new students at European universities frequently working as servants for upperclassmen. *Id.* Violence, however, is a purely American institution. *Id.*; *see also* Olmert, *Points of Origin*, Smithsonian, Sept. 1983, at 150 (story of Wittenberg "yellow bill" ceremony officiated by Martin Luther in 1539. Luther advised his charges: "You'll be subjected to hazing all your life . . . When this happens don't go to pieces. Bear your cross with equanimity and your troubles without murmuring. . . . Say that you first began to be hazed in Wittenberg when you were a young man").

[5] Olmert, *supra* note 4, at 150-51. The ancient practice of "dubbing knights" demands a light but symbolic blow to the shoulder symbolizing the embarkation upon a new life. *Id.* at 151. Another example of hazing includes the puberty initiation rite of some California Indian tribes that involved "stinging a boy with nettles until he was immobile, stinging him with ants and then requiring him to fast." *Id.*; *see also* People v. Lenti, 44 Misc. 2d 118, 253 N.Y.S.2d 9, 13 (1964) (forms of hazing are limited only by imagination of organizations).

[6] R. Raphael, The Men From Boys: Rites of Passage in Male America 12-13 (1988). Dr. Raphael also points out that condemnation is not universal. *Id.* at 12.

[7] *Id.* Raphael explains the lure of rituals thusly:

> The salient feature of primitive initiations, and the reason they continue to hold such appeal, is simply stated: *they work*. An individual who goes through an initiation comes out the other side with a heightened feeling of self-worth, for his manly status has been affirmed both to himself and to the group. His individual confirmation goes hand-in-hand with social recognition: he sees himself as a man, the group treats him as a man, and this public support reinforces a personal sense of his own manliness. As obvious as this might seem, it is no small matter.

Id. at 12-13; *see also* Benjamin, *supra* note 3, at 3100 (author states that "[h]azing has existed in some form probably in every school since time immemorial. No code of laws or regulations however Draconian has ever eliminated it from the category of boyish pranks, and in the nature of things never will"); *Hazing Incidents and Deaths Continue, May Never Be Stopped*, Interfraternity Bulletin, Apr. 1, 1987, at 1 (hazing is gender-linked and recurs "no matter what").

[8] Lantz & Tobias, *A Survivor's Guide to Corporate Hazing*, Working Woman, Dec. 1985, at 96. Author believes corporate hazing on the rise. *Id.*; *see also* Causey v. Ford Motor Co., 516 F.2d 416, 419 (5th Cir. 1975) (hazing of female employee was customary treatment of new employees); Heimbuch v. Georgetown, 251 F. Supp. 614, 615 (D.C.

tention given the subject. The common definitional thread in all forms of hazing is that hazing occurs as a "formal introduction into some position or club . . . which [signifies] that the beginner has been given some new knowledge."[9] Unfortunately, however, many initiation ceremonies have gone beyond imparting knowledge and have led many state legislatures to criminalize certain initiation activities.

II. The Legal Treatment of Hazing

At the heart of the discussion is the existence or absence of legislative expression regarding whether the activity in question is criminal.[10] This determination has many collateral effects. If an activity is performed by an organization or its agents and that activity is deemed criminal, then insurance to cover risks associated with that activity is unavailable to the organization.[11] Since some statutes impose criminal liability on any person, or collegiate faculty member in particular, who fails to report hazing,[12] to expel a student determined to have hazed,[13] or to pre-

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1966) (sophomore hazing committee coordinated on campus hazing of freshman); State v. Feuling, 89 Ill. App. 3d 327, 411 N.E.2d 1106, 1106-07 (1980) (Boy Scout initiation ceremony involved blindfolded scout being led to believe he had kissed another scout's bare buttocks).

[9] Olmert, *supra* note 4, at 151. In many countries, this new knowledge can mean an "understanding of hunting skills, survival practices, or religious or sexual rites." *Id.*

[10] D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Torts § 36 at 229-30 (5th ed. 1984). A violation of a criminal statute may constitute negligence per se. *Id.* Further, "one definite instance of society expressing its condemnation occurs where the state has proscribed the activity through legislation. Thus, where a statutory violation occurs, it is clear that society attaches significant moral blame to the activity of the offender." LeFlore, *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 The Review of Litigation 191, 219 (1988).

[11] LeFlore, *supra* note 10, at 220-21. "[C]riminal liability is not normally an insurable risk, and thus, violations of . . . hazing laws will eliminate any hope of spreading the loss through insurance. This is arguably the correct outcome, since violations of the law should, by their very nature, carry punishment that is borne specifically by the wrongdoer." *Id.*

[12] Ala. Code § 16-1-23 (1975 & Supp. 1990). Alabama requires that any person with knowledge of hazing report it to "the chief executive officer of the appropriate school, college, university, or other educational institution." *Id.* Massachusetts law requires that the "whoever knows . . . and is at the scene of [hazing must report] such crime to an appropriate law enforcement official as soon as reasonably practicable." Mass. Gen. Laws Ann. ch. 269, § 18 (West 1990). Virginia law mandates that the activity be reported to

vent[14] hazing, then those individuals, however remotely affected by these activities, must be apprised of what constitutes criminal hazing. While some states specifically outlaw hazing, many border states do not;[15] thus, individuals may cross state lines in

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the "attorney for the Commonwealth of the county or city in which such school, college or university is, who shall present the same to the grand jury of such city or county." VA. CODE ANN. § 18.2-56 (1988).

[13] N.C. GEN. STAT. § 14-36 (1986 & Supp. 1990).

[14] OHIO REV. CODE ANN. § 2307.44 (Anderson 1987 & Supp. 1989). Ohio places a civil duty on "any administrator, employee, or faculty member of a [primary, secondary, college, university, or any other educational institution] who [knows] or reasonably should [know] of hazing . . . to make reasonable attempts to prevent it." *Id.*; *see also* ALA. CODE § 16-1-23 (c) (1975 & Supp. 1990) (Alabama imposes criminal liability on those who aid, permit, encourage, or assist in hazing activities); CAL. EDUC. CODE § 32052 (West 1978 & Supp. 1989) (same); R.I. GEN. LAWS § 11-21-1 (1956 & Supp. 1990) (same); TEX. EDUC. CODE ANN. § 4.53 (Vernon 1991) (criminal liability imposed on those who encourage or condone hazing).

[15] *See* cases cited *infra* note 37. Except for Connecticut, Florida, Louisiana, and Rhode Island, each state which outlaws hazing by statute, is adjacent to at least one state that does not criminalize such conduct. The following chart summarizes this phenomenon:

State Outlawing Hazing	Respective Border State(s) With No Anti-Hazing Law
Alabama	Tennessee
Arkansas	Oklahoma, Tennessee
California	Arizona, Nevada
Georgia	South Carolina, Tennessee
Illinois	Iowa
Indiana	Michigan, Kentucky*
Maryland	West Virginia
Massachusetts	New Hampshire, Vermont
Mississippi	Tennesssee
Missouri	Iowa, Kansas, Nebraska, Oklahoma
New York	Vermont, New Jersey**
North Carolina	Tennessee
Ohio	Michigan, West Virginia
Oregon	Idaho, Nevada, Washington
Pennsylvania	New Jersey**, West Virginia
Texas	New Mexico, Oklahoma
Utah	Arizona, Colorado, Idaho, Nevada, New Mexico, Wyoming
Virginia	Tennessee, West Virginia
Wisconsin	Iowa, Minnesota, Michigan

* Kentucky and Maine carry no criminal penalties for hazing.

** New Jersey's anti-hazing statute expired Dec. 30, 1985.

order to escape the reach of criminal hazing statutes. A person can cross adjacent state boundaries and commit legal hazing activities, whereas the same conduct might be statutory "criminal hazing" in their resident state. Alternatively, the penalties for hazing may be less onerous in one state than those of a border state. The fact that one's conduct may be a crime in a given state may raise a legal duty which may facilitate a finding of civil liability.[16] Thus, in the few cases that have held a local fraternity negligent, the existence of a criminal statute has been germane to the existence of the fraternity's duty not to harm a pledge during initiation ceremonies.[17] Implicitly, in the absence of statute, a duty may not arise. A fortiori, in the absence of a criminal anti-hazing statute, certain conduct may not be a crime. The discussion becomes further entangled because of the victim's consent to what may or may not be a criminal act.[18]

III. The Scope of Initiation

In a case addressing the issue of criminal hazing, Justice Oppido stated, "[I]t would have been an impossible task if the legislature had attempted to define hazing specifically. Fraternal organizations and associations have never suffered for ideas in contriving new forms of hazing."[19] Based on only the reported acts accompanying initiation into fraternities and other organizations, Justice Oppido's statement is accurate. The author's research has revealed that initiates, during their pledge periods,

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[16] Quinn v. Sigma Rho Chapter, 155 Ill. App. 3d 231, 507 N.E.2d 1193, 1998 (1987). The Illinois Appellate Court stated that although a legal duty is normally not established through rules and regulations of a university, "violation of a statute or ordinance designed for the protection of human life or property is prima facie evidence of negligence." *Id.*

[17] Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488, 492 (S.C. App. 1986). This duty may arise in the absence of statute. "The duty may result from the relation of the parties. Whether the relation between two persons is such as gives rise to a duty to use care is a pure question of law for the court to determine." *Id.*

[18] W. Lafave & A. Scott, Criminal Law § 7.15, at 685 (2d ed. 1986). Many jurisdictions held that one cannot consent to atrocious assault, or to acts which by themselves shock the conscience of the court. *Id.*

[19] People v. Lenti, 44 Misc. 2d 118, 253 N.Y.S.2d 9, 14 (1964). In *Lenti*, the court upheld the constitutionality of New York's criminal hazing statute against a challenge of vagueness. *Lenti*, 253 N.Y.S.2d at 14.

have been subjected to an assortment of social tortures. These acts range in scope from the innocuous, such as subjecting an individual to verbal abuse while in a line-up,[20] to the brutal, where initiates are tied to railroad tracks and forgotten,[21] buried alive,[22] or gang raped.[23] Brutality such as this is not limited to college campuses. Often freshmen laborers are tormented with inhumane workplace rituals.[24] Many of these same events have

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[20] *Fraternity Members Punished for Role in Student's Death at Morehouse College*, JET, Nov. 6, 1989, at 13.

[21] *Vocational Training for Bullies*, SCHOOL AND SOCIETY, Nov. 4, 1916, at 714.

[22] *Id.*

[23] *Tragic Deaths Force Renewed Debate on Value of Fraternities*, THE FRATERNITY NEWSLETTER, Sept./Oct. 1989, at 7; *see also* Harden v. United States, 688 F.2d 1025, 1026-27 (5th Cir. 1982) (pledge shot by park ranger while "streaking nude" through campsite as part of initiation ritual); Nesmith v. Grimsley, 702 F. Supp. 122, 123-24 (D.S.C.1988) (black cadet racially harassed as part of military ritual); *Hope College Fraternity Caught for Alleged Hazing*, THE FRATERNITY NEWSLETTER, June 1988, at 8 (pledges required to wear only blue jock straps and were burned lightly with matches if they could not recite preamble to U.S. Constitution); *Texas University Still Battling Hazing*, THE FRATERNITY NEWSLETTER, Feb. 1988, at 11 (pledges hit with two-handed paddles and poked with cattle prods); O'Connor, *Death Among the Greeks (Hazing and Fraternities)*, NEWSWEEK, Nov. 10, 1986, at 32 (initiates poisoned); Hechinger, *Hazing Deaths Spur Successful Campaign Against the Practice*, NEW YORK TIMES, Sept. 2, 1980 at C1, col. 1 (initiates deprived of sleep, made recipients of phony class failure notes, and interrogated under bright lights with threats of retribution); Davidson, *Killer Hazing*, U.S. REPORTS, Sept. 29, 1981, at 54 (pledge died after being locked in car trunk in freezing weather and required to consume alcohol); *Ban the Bomb*, TIME, Apr. 30, 1965, at 60 (ninth-grade pledge punched in stomach and back simultaneously in ceremony known as "atomic bomb"); *Hazing Had Parallel Among Primitive People*, SCIENCE DIGEST, Jan. 1961, at 23 (initiates forced to shave their heads, spray paint their bodies, and walk publicly in clothing of opposite sex); *The Netherlands: Night of the Pig*, TIME Nov. 9, 1962, at 35 (initiates soaked with hot soup, crammed naked into room with over 230 other underclassmen, called "fetuses," and drenched with beer while upperclassmen walked on their heads, then forced to make their way through small opening called "uterus"); *The Brothers*, TIME, Sept. 23, 1959, at 46 (pledge choked to death when forced to consume raw liver); *Texas and Delta Sigma Phi*, TIME, Mar. 19, 1956, at 86 (pledges forced to wear burlap bags, drink mineral oil, and play wheelbarrow); *College Hazing: Brutal Initiation Practices Fast Disappearing From American College Campuses*, EBONY, Dec. 1953, at 29-32 (pledges paddled, publicly made to kiss each other, munch all day on king size sucker, and look for four-leaf clover by lantern light); *A Ride in the Country*, TIME, Mar. 5, 1951, at 59 (pledges required to have hair clipped and pulled out, be stoned, and have their heads and bodies smeared with tar and creosote, and be severely lashed); Withey, *This Matter of Hazing*, 74 SCHOOL AND SOCIETY 133 34 (1951) (pledges required to wear caps, costumes, and signs, prohibited from having dates for certain periods of time, forced to wait upon other students and be subjected to physical retaliation if they refused to comply).

[24] Vaughn v. Pool Offshore Co., 683 F.2d 922, 923-24 (5th Cir. 1982) (new employee

ended in death, resulting in action by state legislatures to criminalize hazing.

IV. A Brief History of American Anti-Hazing Laws

The first hazing statute in America appeared in 1874 in response to hazing in the military.[25] The need for regulation of the practice was deemed necessary as a result of the perceived attitude toward hazing by midshipmen:

> [There persisted] a general notion that personal physical humiliation is the best way to eradicate conceit or "freshness." The "plebe" is made to do "silly things," or painful things. Almost unanimously they declare that it is good for the new men to be thus hazed. And this is done by those members of the class who are the natural bullies, who are not judicial by nature, but rather brutal, who see fun in tormenting their fellows, as if in this way educational results were to be secured. [T]his method [was] not applied simply to those who show[ed] . . . faults, but every one [was] hazed, even the best and most promising boys; and those were specially chosen to be thus deviled who were sons of distinguished officers and are merely presumed to be vain of their parentage. Really, the defense [was] but a pretense for the practice of what [gave] amusement by giving pain.[26]

Therefore, in June of 1874, Congress enacted a drastic law which made every form of "plebe bedevilment," whether harmful or not, an offense to be dealt with by court martial.[27] Furthermore, the law provided that upon an adverse verdict, the recommendation of dismissal by the superintendent should be final and carry

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was greased with oil, showered with ammonia, thrown into cold shower, and had hot coffee poured in pockets as part of ritual for oil rig workers).

[25] Benjamin, *The Trouble at the Naval Academy*, 60 The Independent 154, 155 (1906). The 1874 statute outlawing hazing was directed specifically at the United States Naval Academy. *Id.* at 155. However, some commentators at that time criticized the singling out of the Navy, noting that knowing hazing was a habit of the army people was enough to make midshipmen leave it alone. *Id.*

[26] *Hazing*, 53 The Independent 51-52 (1901).

[27] Benjamin, *supra* note 25, at 155. Even after the passage of the 1874 law, the practice apparently continued. *Id.*; *see also* Davidson, *Killer Hazing*, U.S. Reports, Sept. 29, 1981, at 564 (as West Point cadet, future general Douglass MacArthur's hazing included deep knee bends over broken glass until he passed out).

with it perpetual incapacity for reinstatement.[28] That statute[29] provided that

> [i]n all cases where it shall come to the knowledge of the Superintendent of the Naval Academy, at Annapolis, that any naval cadet has been guilty of the offense commonly known as hazing, it shall be the duty of said Superintendent to order a court-martial composed of not less than three commissioned officers, who shall minutely examine into all the facts and circumstances of the case and make a finding thereon; and any naval cadet found guilty of said offense by said court shall, upon recommendation of said court, be dismissed, and such finding, when approved by said Superintendent, shall be final and the cadet so dismissed from said Naval Academy shall be forever ineligible to reappointment to said Naval Academy — (Act of Congress, approved June 23, 1874, and August 5, 1874).[30]

State legislatures were not quick to pick up on the military's lead in proscribing the practice of hazing. Although hazing existed in institutions other than the military, it was twenty-seven years before the first state anti-hazing law appeared. In 1901, Illinois passed the following law: "Whoever shall engage in the

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[28] Benjamin, *supra* note 25, at 155.

[29] 10 U.S.C.A. §§ 4352, 6964, 9352 (West 1959). Illustrative of the armed forces anti-hazing statutes is the Army's statute:

> Section 4352. Cadets: Hazing
>
> (a) Subject to the approval of the Secretary of the Army, the Superintendent of the Academy shall issue regulations—
>
> (1) defining hazing;
>
> (2) designed to prevent that practice; and
>
> (3) prescribing dismissal, suspension, or other adequate punishment for violations.
>
> (b) If a cadet who is charged with violating a regulation issued under subsection (a), the penalty for which is or may be dismissal from the Academy, requests in writing a trial by a general court-martial, he may not be dismissed for that offense except under sentence of such a court.
>
> (c) A cadet dismissed from the Academy for hazing may not be reappointed to the Corps of Cadets, and is ineligible for appointment as a commissioned officer in a regular component of the Army, Navy, Air Force, or Marine Corps, until two years after the graduation of his class. Aug. 10, 1956, c. 1041, 70A Stat. 244.

10 U.S.C.A. § 4352 (West 1959).

[30] Benjamin, *supra* note 3, at 3099.

practice of hazing in this state, whereby any one sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor."[31] Illinois defined hazing as

> any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others.[32]

In the subsequent eighty-nine years, only twenty-five states passed anti-hazing laws,[33] twelve of them being enacted in the eighties and one in early 1990. During the 1980s, many state legislatures became active in the hazing area as a result of an increase in collegiate fraternity hazing-related deaths,[34] particularly the death of Chuck Stevens, which gave impetus to the creation of the Committee to Halt Useless College Killings (CHUCK).[35] The mission of CHUCK is to alert society and state legislatures of "violent" hazing activities involved in collegiate fraternity pledging.[36] Surprisingly, though, by 1990, approximately half of the American states had failed to pass any legislation regulating hazing. Of those which have anti-hazing statutes, only one may reach hazing by non-collegiate, non-fraternal organizations. Furthermore, the anti-hazing laws which have been passed vary dramatically as to what constitutes hazing. In addition, questions remain as to the scope, constitutionality, and enforceability of those criminal laws.

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[31] ILL. ANN. STAT. ch. 144, para. 221 (Smith-Hurd 1986).

[32] ILL. REV. STAT. ch. 144, para. 222 (1986).

[33] *See infra* note 37 and accompanying text.

[34] Davidson, *Killer Hazing*, U.S. REPORTS Sept. 29, 1981, at 54. It was reported that "[s]ince the first recorded hazing death in 1894, at least 65 students [had] died from hazing," and "[from]" 1869 [to 1981], 36 Frat pledges had been hazed to death." *Id.*

[35] Stevens, *A Fraternity Ritual Killed My Son*, REDBOOK Feb. 1986, at 27. Eileen Stevens founded CHUCK in 1978 after her son died on February 25, 1978, during a Klan Alpine Fraternity initiation activity involving alcohol poisoning at Alfred University in Massachusetts. *Id.*

[36] Webbe, *Hazing: Sometimes a Lethal Game*, THE CHRISTIAN SCIENCE MONITOR, 1980 at 33. Eileen Stevens, the founder and president of CHUCK, stated that she is directing her efforts toward "life-threatening, dangerous hazing, where there is a total disregard for human life, and dangerous, unnecessary risks are taken." *Id.* She emphasizes that "[s]he is not anti-fraternity . . . simply anti-abuse." *Id.*

V. The Present Reach of American Anti-Hazing Statutes

Hazing is regulated in twenty-five states.[37] Of those states, it is a criminal offense to haze in all but three states.[38] The vast majority of those states provide that hazing is a misdemeanor.[39]

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[37] *See generally* Ala. Code § 16-1-23 (1975 & Supp. 1990); Ark. Stat. Ann. §§ 6-2-201 to 6-5-204 (1987); Cal. Educ. Code §§ 32050-32052 (West 1978 & Supp. 1991); Conn. Gen. Stat. Ann. § 53-23a (Supp. 1990); Fla. Stat. Ann. § 240.262 (West 1989); Ga. Code Ann. § 16-5-61 (1988 & Supp. 1990); Ill. Ann. Stat. ch. 144, para. 221, 222 (Smith-Hurd 1986); Ind. Code Ann. § 35-42-2-2 (Burns Supp. 1990); Ky. Rev. Stat. Ann. § 164.375 (Baldwin 1990); La. Rev. Stat. Ann. § 1801 (West 1982); Me. Rev. Stat. Ann. tit 20-A, § 100004 (Supp. 1990); Md. Crim. Law Code Ann. § 27-268H (1987); Mass. Gen. Laws Ann. ch. 269, §§ 17-19 (West 1990); Miss. Code Ann. § 97-3-105 (Supp. 1990); Mo. Ann. Stat. §§ 578.360-.365 (Vernon Supp. 1990); N.Y. Penal Law §§ 120.16, 120.17 (Consol. 1987 & Supp. 1991); N.C. Gen. Stat. §§ 14-35 to 14-36, 14-38 (1986 & Supp. 1990); Ohio Rev. Code Ann. §§ 2903.31, 2307.44 (Anderson 1987 & Supp. 1989); Or. Rev. Stat. § 163.197 (1983); 24 Pa. Cons. Stat. Ann. §§ 5351-5354 (Purdon Supp. 1990); R.I. Gen. Laws §§ 11-21-1 to 11-21-3 (1956 & Supp. 1990); Tex. Educ. Code Ann. §§ 4.51-4.58 (Vernon 1991); Utah Code Ann. § 76-5-107.5 (1990); Va. Code Ann. § 18.2-56 (1988); Wis. Stat. Ann. § 948.51 (West Supp. 1990).

[38] *See generally* Fla. Stat. Ann. § 240.262 (West 1989); Ky. Rev. Stat. Ann. § 164.375 (Baldwin 1990); Me. Rev. Stat. Ann. tit. 20-A, § 10004 (Supp. 1990) (legislatures of these states have instructed their respective state colleges and universities to adopt rules regulating hazing. Consequently, no criminal penalties for hazing exist).

[39] *See generally* Ala. Code § 16-1-12 (1975 & Supp. 1990) (offense of hazing is Class C misdemeanor); Ark. Stat. Ann. § 6-5-203 (1987) (offense of hazing is Class B misdemeanor); Cal. Educ. Code § 32051 (West 1973 & Supp. 1990) (hazing is misdemeanor punishable by fine not to exceed $5,000 and/or imprisonment not more than one year); Conn. Gen. Stat. Ann. § 53-23a (Supp. 1990) (violator subject to fine not greater than $1,000); Ga. Code Ann. § 16-5-61 (Supp. 1990) (violator shall be guilty of high and aggravated misdemeanor); Ill. Ann. Stat. ch. 144, para. 221 (Smith-Hurd 1986) (hazing is Class B misdemeanor); La. Rev. Stat. Ann. § 1801 (West 1982) (violator fined not more than $100 and/or imprisoned not more than thirty days); Md. Crim. Law Code Ann. § 27-268H (1987) (hazing is misdemeanor and subject to fine not to exceed $500 and/or imprisonment for no more than six months); Mass. Gen. Laws Ann. ch. 269, § 17 (West 1990) (violator subject to fine not to exceed $3,000 and/or imprisonment up to one year); Miss. Code Ann. § 97-3-105 (Supp. 1990) (violator subject to fine not to exceed $2,000 and/or imprisonment up to six months); Mo. Ann. Stat. § 578.365 (Vernon Supp. 1990) (hazing is Class A misdemeanor); N.J. Stat. Ann. § 20:40-3 (West 1982) (aggravated hazing is crime of fourth degree); N.Y. Penal Law § 120.16 (Consol. 1987) (hazing is Class A misdemeanor); N.C. Gen. Stat. § 14-35 (1986) (hazing is misdemeanor punishable by fine of not more than $500); Or. Rev. Stat. § 163.197 (1990) (organization guilty of hazing punishable by fine of not more than $1,000; individual violator subject to fine not to exceed $250); 24 Pa. Cons. Stat. Ann. § 5353 (Purdon Supp. 1990) (hazing is misdemeanor of third degree); R.I. Gen. Laws § 11-21-1 (1990) (violation is misdemeanor punishable by fine not to exceed $500 and/or imprisonment for not more than one year); Tex. Educ. Code Ann. § 4.52 (Vernon 1991) (if offense does not cause serious bodily injury fine not less than $500 not to exceed $1,000 and/or imprisonment up to 180 days);

Four states, however, indicate that certain forms of hazing can constitute a felony.[40] Many states mandate the expulsion from school of one convicted of hazing,[41] or the loss of entitlement to scholarship or public monies.[42] Thus, the definition of the crime of hazing is critical.

A crime must be strictly defined by state legislatures. The legislative language used to define and proscribe hazing varies among the states; consequently, hazing is defined differently in each of the states which provide criminal penalties for hazing. The most common form of physical hazing, that conduct which

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UTAH CODE ANN. § 76-5-107.5 (1990) (hazing is class B misdemeanor if no aggravating circumstances, class A misdemeanor if act involves use of motor vehicle); VA. CODE ANN. § 18.2-56 (1988) (hazing is Class 1 misdemeanor unless injury would tend to constitute felony); WIS. STAT. ANN. § 948.51 (West Supp. 1990) (violator guilty of Class A misdemeanor if act results in bodily harm).

[40] *See generally* IND. CODE ANN. § 35-42-2-2(C)(2) (Burns 1985) (Class D felony hazing is defined as hazing that results in "serious bodily injury to a person"); UTAH CODE ANN. § 76-5-107.5(3)(C)(d) (1990) (third degree felony if hazing involves deadly weapon or "results in serious bodily injury"); VA. CODE ANN. § 18.2-56 (1988) (if act itself is felony, then it is so treated); WIS. STAT. ANN. § 948.51(B)(b) (West Supp. 1990) (class E felony if act results in great bodily harm or death).

[41] Arkansas law provides that "[u]pon conviction of any student of the offense of hazing, he shall, in addition to any punishment imposed by the court, be expelled from the school, college, university, or other educational institution he is attending." ARK. STAT. ANN. § 6-5-203(b) (1987). North Carolina's statute is nearly identical, but also includes anyone guilty "of aiding or abetting in the commission of this offense." N.C. GEN. STAT. § 14-36 (1990). Kentucky law states "the penalties for violation of [hazing] policy . . . shall include . . . expulsion." KY. REV. STAT. ANN. § 164.375 (Baldwin 1990). Louisiana law states "[w]hoever violates . . . shall be permitted to return during the current session or term in which the violation occurs." LA. REV. STAT. ANN. § 17:1801 (West 1982). Maine provides that "penalties shall include . . . expulsion." ME. REV. STAT. ANN. tit. 20-A § 10004 (1983). Congress has provided that an army/air force cadet or naval midshipman convicted of hazing "may not be reappointed and is ineligible for appointment as a commissioned officer . . . until two years after the graduation of his class." 10 U.S.C.A. §§ 4352, 6964, 9352 (West 1959).

[42] *See* ALA. CODE § 16-1-23(e) (1975 & Supp. 1990). The Alabama statute provides in pertinent part:

> [a]ny person who participates in the hazing of another, or any organization associated with a school, college, university, or other educational institution in this state which knowingly permits hazing to be conducted by its members or by others subject to its direction or control, shall forfeit any entitlement to public funds, scholarship, or awards which are enjoyed by him or by it and shall be deprived of any sanction or approval granted by the school, college, university, or other educational institution.

Id.; *see also* CAL. EDUC. CODE § 32052 (West 1978 & Supp. 1990) (California code provides for similar loss of entitlement).

would most likely constitute common law battery[43] or assault,[44] has been outlawed in a number of states. However, the language utilized by the respective state legislatures to achieve that abolition is often neither identical nor clearly effective in achieving the respective legislative ends. For example, "beating" an individual is criminal hazing in at least eleven states.[45] Of those eleven states, seven include "branding"[46] and eight include "whipping"[47] in their definition of criminal hazing. While neither the Alabama nor the Arkansas statutes specifically mention whipping or branding, they both state that "bruising," "maiming," "seriously offending, threatening, or attempting to

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[43] W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.15, at 685 (2d ed. 1986). The authors state:

> Common law criminal battery is sometimes defined briefly as the unlawful application of force to the person of another. It may be divided into three basic elements: (1) the defendant's conduct (act or omission); (2) his "mental state," which may be an intent to kill or injure, or criminal negligence, or perhaps the doing of an unlawful act; and (3) the harmful result to the victim, which may be either a bodily injury or an offensive touching. What might otherwise be a battery may be justified; and the consent of the victim may under some circumstances constitute a defense.

Id.

[44] *Id.* at 691-94. The crime of assault is defined by statute in various ways. *Id.* at 691. There are, however, two main varieties: (1) assault as attempted battery and (2) assault as an intentional scaring. *Id.* at 691-94. The first type requires (1) "an intent to commit a battery, i.e., an intent to cause injury to the victim" and (2) the attempting party must "come pretty close to committing it." *Id.* at 692. The second type requires (1) an intent to scare, (2) the victim must be apprehensive of bodily harm, and (3) conduct by the defendant of the sort to arouse a reasonable apprehension of bodily harm. *Id.* at 693-94.

[45] *See* ALA. CODE § 16-1-23(a)(2) (1975 & Supp. 1990); ARK. STAT. ANN. § 6-5-201(a)(4) (1987); FLA. STAT. ANN. § 240.262(1) (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990); MO. ANN. STAT. § 578.360(2)(a) (Vernon Supp. 1991); N.C. GEN. STAT. § 14-35 (1990); 24 PA. CONS. STAT. ANN. 24 § 5352 (Purdon Supp. 1990); R.I. GEN. LAWS § 11-21-1 (1990); TEX. EDUC. CODE ANN. § 4.51(6)(a) (Vernon 1991); UTAH CODE ANN. § 76-5-107.5(1)(c) (1990); WIS. STAT. ANN. § 948.51(2) (West Supp. 1990).

[46] *See* FLA. STAT. ANN. § 240.262(1) (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 17 (1990); MO. ANN. STAT. 578.360(2)(a) (Vernon Supp. 1991); PA. STAT. ANN. § 5352 (Supp. 1990); R.I. GEN. LAWS § 11-21-1 (1990); UTAH CODE ANN. § 76-5-107.5(1)(c) (1990); WIS. STAT. ANN. § 948.51(2) (West 1990).

[47] *See* FLA. STAT. ANN. § 240.262(1) (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 17 (1990); MO. ANN. STAT. 578.360(2)(a) (Vernon Supp. 1991); 24 PA. CONS. STAT. ANN. § 5352 (Supp. 1990); R.I. GEN. LAWS § 11-21-1 (1990); TEX. EDUC. CODE ANN. § 4.51(6)(a) (Vernon. 1991); UTAH CODE ANN. § 76-5-107.5(1)(c) (1990); WIS. STAT. ANN. § 948.51(2) (West 1990).

strike, beat, bruise, or maim," or any "attempt to do physical violence" constitutes criminal hazing.[48]

Any "forced physical activity which could adversely affect the physical health or safety of the individual" constitutes criminal hazing in Florida.[49] Any "activity which endangers or is likely to endanger physical health of a student" is hazing in Georgia.[50] "Any [forced] activity which creates a substantial risk of bodily injury" is hazing in Indiana.[51]

In many states, actual physical contact is not required to constitute hazing.[52] It is a criminal offense to "frighten, scold, . . . or harass" in North Carolina.[53] Criminal hazing prohibitions extend to the protection of the hazee's general mental welfare as well. It is criminal hazing in California to commit any act likely to cause "mental harm."[54] "Requiring any activity that would

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[48] *See* ALA. CODE § 16-1-23(2) (1987); ARK. STAT. ANN. § 6-5-201(a)(4) (1987).

[49] FLA. STAT. § 2401.262 (1989); *see also* MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990) (defining hazing as "forced physical activity which is likely to adversely affect the physical health or safety of any such student").

[50] GA. CODE ANN. § 16-5-61 (Supp. 1990); *see also* KY. REV. STAT. ANN. § 164.375(1) (Baldwin 1990) (defining hazing as any action or situation which recklessly or intentionally endangers mental or physical health); OR. REV. STAT. § 163.197 (1990) ("haze means to subject a person to bodily danger or physical harm or a likelihood of bodily danger or physical harm").

[51] IND. CODE ANN. § 35-42-2-2 (Burns Supp. 1990); *see also* MISS. CODE ANN. § 97-3-105(a)(2) Supp. 1990) (defining hazing as "an act that creates a substantial risk of bodily injury to another person"); N.Y. PENAL LAW § 120.16 (McKinney Supp. 1990) (defining hazing as "conduct which creates a substantial risk of physical injury"); OHIO REV. CODE ANN. § 2903.31(A) (Anderson 1987) (defining hazing as "any act of initiation . . . that causes or creates a substantial risk of causing mental or physical harm to any person").

[52] *See* GA. CODE ANN. § 16-5-61 (Supp. 1990) (defining hazing as conduct which "endangers or is likely to endanger the physical health of the student"); IND. CODE ANN. § 35-42-2-2 (Burns Supp. 1990) (defining hazing as "an act that creates a substantial risk of bodily injury"); LA. REV. STAT. ANN. § 17.1801 (West 1982) (defining hazing as conduct which is "likely to cause . . . bodily danger or physical punishment"); MD. CRIM. LAW CODE ANN. CODE ANN. § 18.2-57 (1988) (making it "unlawful to haze, or otherwise mistreat so as to cause bodily injury").

[53] N.C. GEN. STAT. § 14-35 (1986). Hazing is defined as "[annoying] any student by playing . . . tricks upon him, to frighten, scold, . . . or harass him, or to subject him to personal indignity." *Id.*

[54] CAL. EDUC. CODE § 32050 (West 1978 & Supp. 1991). Hazing includes any act which "causes, or is likely to cause, bodily danger or physical harm, or personal degradation or disgrace resulting in physical or mental harm." *Id.*; *see also* FLA. STAT. ANN. § 240.262(1) (West 1989) (hazing "includes any activity which would subject the individual to extreme mental stress"); ME. REV. STAT. ANN. tit. 20-A, § 10004 (Supp. 1990) (defining "injurious hazing" as "any action or situation which recklessly or intentionally endangers

subject the person to extreme mental stress" is hazing in Connecticut,[55] and "[a]ny activity [which] creates a substantial risk of mental injury" is hazing in Ohio.[56]

Some states are rather ambiguous about what would constitute hazing where no physical contact is involved, although it is commonly understood in legal jurisprudence that a criminal statute must not be vague.[57] In many states, physical contact is not required to commit hazing. *People v. Lenti*,[58] is one case[59] in which a court confronted the issue of vagueness and interpreted the constitutionality of a criminal hazing statute. In *Lenti I*, the indictment accused the defendants of the crime of "hazing," in violation of Section 1030[60] of the Penal Law of the State of New

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the mental or physical health of a student"); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990) (defining hazing as "conduct . . . which wilfully or recklessly endangers the physical or mental health of any student or other person"); TEX. EDUC. CODE ANN. § 4.51(6) (Vernon 1990) (defining hazing as any act "that endangers the mental or physical health or safety of a student"); UTAH CODE ANN. § 76-5-107.5 (1990) (hazing includes "any action or situation" which "recklessly or intentionally endangers the mental or physical health or safety of any person").

[55] CONN. GEN. STAT. ANN. § 52-23a (West Supp. 1990); *see also* FLA. STAT. ANN. § 240.262 (West 1989) (hazing includes "any activity which would subject the individual to extreme mental stress"); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990) (defining hazing as any activity "which subjects such student or other person to extreme mental stress"); TEX. EDUC. CODE ANN. § 4.51(6)(D) (Vernon 1990) (defining hazing as any activity which "subjects the student to extreme mental stress, shame, or humiliation"); UTAH CODE ANN. § 76-5-107.5(1)(e) (1990) (hazing "involves any activity that would subject the individual to extreme mental stress").

[56] OHIO REV. CODE ANN. § 2903.31(A) (Anderson 1987).

[57] *See* Winters v. New York, 333 U.S. 507 (1948). In *Winters*, the Court stated: "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of [the Constitution] is void, on its face, as contrary to the Fourteenth Amendment." *Winters*, 333 U.S. at 509. The *Winters* Court stated the proposition in the context of a first amendment problem, but went on to add that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." *Id.* at 515.

[58] 44 Misc. 2d 118, 253 N.Y.S.2d 9 (Nassau County Ct. 1964).

[59] Actually, there were two cases, People v. Lenti, 44 Misc. 2d 118, 253 N.Y.S.2d 9 (Nassau County Ct. 1964) (*Lenti I*) and People v. Lenti, 46 Misc. 2d 682, 260 N.Y.S.2d 284 (Nassau County Ct. 1965) (*Lenti II*). However, both cases arose out of the same facts. *Lenti I* involved the constitutionality of New York's anti-hazing statute. *Lenti*, 253 N.Y.S.2d at 9. In *Lenti II*, the case was dismissed on other grounds, but the court offered suggestions to the New York Legislature as to a more definitive statute. *Lenti*, 260 N.Y.S.2d at 287-89.

[60] *Lenti*, 253 N.Y.S.2d at 11. Section 1030 provided:

York:

> The defendants . . . each aiding and abetting the other and acting in concert, and accompanied by juveniles . . . did wilfully and unlawfully engage in what is commonly called hazing, while attending an institution of learning in Union Free School . . . each aiding and abetting the other and acting in concert . . . during an installation of pledges in an initiation known as "Hell Night," for the purpose of inducting certain pledges into a fraternal organization, known as Omega Gamma Delta Fraternity . . . by . . . striking them about the body and face with clenched fists, open hands, forearms and feet.
>
> The indictment also accuse[d] the defendants of the crime of Assault, in the Third Degree (five counts), in violation of Section 244 of the Penal Law.[61]

The defendants, in urging dismissal of the indictment, argued that "there is neither a definition of the word 'hazing', nor a sufficient standard established by the statute by which this Court can properly ascertain what actions the Legislature intended to make criminal."[62]

In declining to hold that the statute was unconstitutionally vague, the court stated:

> "Hazing" is a word, which incorporates treatment such as the wearing of a "beanie cap" to the permanent disfigurement of the body. It would have been an impossible task if the legislature had attempted to define hazing specifically. Fraternal organizations and associations have never suffered for ideas in contriving new forms of hazing. . . . Therefore, the present statute which prohibits hazing . . . goes no further than to recognize that as with other complex areas of life, between the polar extremities, the wearing of a "beanie cap" and the per-

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> It shall be unlawful for any person to engage in or aid or abet what is commonly called hazing, in or while attending any of the colleges, public schools or other institutions of learning in this state, and whoever participates in the same shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than one hundred dollars, or imprisonment not less than thirty days nor more than one year, or both at the discretion of the court.

Id.

[61] *Lenti*, 253 N.Y.S.2d at 10-11.

[62] *Id.* at 12.

> manent disfigurement of the human body, it is impossible to draw an arbitrary line in advance defining what is obviously legal and illegal. Such drawing of an artificial line would necessarily lead to unjust inequities.[63]

The case was finally dismissed by a "co-ordinate" court on other grounds.[64] In *Lenti II*, the court seemed to reverse the decision[65] of *Lenti I*[66] regarding the issue of ambiguity. The court said:

> [T]he novel questions of fact presented clearly reveal the lack of guide lines [sic] in Section 1030 of the Penal Law which a normal criminal statute provides to the Court for the purpose of instructing the Jury on the elements of a specific crime. Section 1030 is not only vague, but also ambiguous. It refers to participants, which of necessity must include the pledges, the individuals for whom this statute was enacted to protect. Are pledges who participate equally guilty of hazing under the terms of this statute? Does this in law make them accomplices, therefore, requiring corroboration of their testimony? And what of their consent to participation in the hazing procedures? When does the hazing treatment administered exceed the consent given? If the consent is given intelligently, volunta-

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[63] *Id.* at 13-14.

[64] *Lenti*, 260 N.Y.S.2d at 284.

[65] The court was emphatic that its *Lenti II* decision was not in conflict with its opinion in *Lenti I*. Nonetheless, the court seemed to strain to reach this plateau of comfort. It indicated:

> [I]n the context of the pattern of facts that has been presented by [the state], and after profound thought and meditation, *reservations in the thinking of the Court exist as to the validity and enforceability of the hazing statute.* This comment is in complete harmony with the prior ruling, and the chronological perspective completely consistent therewith, and made merely to focus legislative attention on the unenforceable aspects of the statute; and if as a consequence of extended elaboration by this Court of the shortcomings of the existing statute, a new statute adequately recognizing the contemporary problems of hazing is promulgated, the end of justice will be considered enhanced.

Lenti, 260 N.Y.S.2d at 287 (emphasis added).

[66] *Lenti II* questioned the validity of § 1030 with respect to the provision that said, "It shall be unlawful for any person to engage in or aid or abet what is commonly called hazing . . . and whoever participates in the same shall be deemed guilty of a misdemeanor." *Lenti*, 260 N.Y.S.2d at 286. The question was important since if the pledges themselves were participants, then their testimony, by which convictions were sought, had to be corroborated. *Lenti*, 260 N.Y.S.2d at 286.

> rily and free of deceit or fraud, is this a complete bar and a defense to the acts prohibited by the Section? Do the participants have a legal obligation to abandon the activities, or resort to acts of self-defense in order to dissolve the consent as a defense to make it no longer binding? It is strongly urged that the Penal Law involving hazing contain guide lines [sic] and criteria to resolve these queries.[67]

The court answered its own inquiries in the negative: "[C]onsent of the pledges certainly should not be a bar to prosecution; intelligent consent cannot be a defense when the public conscience and morals are shocked.[68] [N]or should participation by pledges deem them accomplices."[69] The court dismissed the charges against all defendants and offered its own suggestions to the Legislature to render the statute unobjectionable:

> [I]n order to make [the statute] more enforceable, the following definitions should apply to the terms and conditions of said statute:
>
> *Engage* — The word "engage" as used in this Section should mean and include,
>
> 1. Any member of a fraternity who actually participates in planning the hazing procedures, as well as those who physically execute the practices.
>
> *Aid or Abet* — Aiding or abetting as used in this statute should not refer to the "pledges" or individuals upon whom the

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[67] *Lenti*, 260 N.Y.S.2d at 286.

[68] The court emphasized that:

> The acts committed by the defendants and fellow members of this fraternity are not being condoned by this Court. In fact, this court will pontificate to the extent whereby it will reveal its conscience is clearly shocked by the conduct these defendants and the members of this fraternity have exhibited; their conduct in the treatment of their contemporaries can only be characterized as sadistic, barbaric and immoral. The dangers inherent in hazing procedures and practices cannot be eliminated unless society, in close cooperation with school administrators, develop [sic] policies and attitudes that exhibit an awareness of the wrong and conscientious desire to eliminate it. Initially, a community effort should be set in motion to compel the legislature to pass a statute that is sufficiently clear in its term [sic] so that the acts prohibited are clearly defined and enforceable, and everyone is sufficiently advised in advance of the criminal activities to be condemned.

Lenti, 260 N.Y.S.2d at 288.

[69] *Lenti*, 260 N.Y.S.2d at 287 (citations omitted).

hazing practices are administered; they should not be deemed accomplices as a matter of law and their testimony should not require corroboration to establish a violation of the Section, but the violation itself must be established by other independent evidence.

Mere membership in a fraternity should not constitute aiding and abetting in hazing practices, unless it is established that a member actively participated in the planning of the practices; and the plan as constituted was physically implemented; mere presence at a meeting where the practice is executed should not be violation of this Section, unless an individual by a manifest act shows intent to participate.

Hazing — Hazing should be defined as any act or series of acts which cause, or is likely to cause bodily danger of physical harm; or to mistreat by playing stunts or practice abusive or ridiculous tricks, that subject an individual to personal indignity or ridicule.

The duly elected officers of a fraternity should be directed by law to incorporate a copy of this statute into the by-laws of the fraternity, and to read to prospective pledges a copy of this statute before each and every duly constituted pledge meeting. Failure to do so should constitute a violation of this Section by the officer of the fraternity officially conducting the meeting.

It should be immaterial where the meeting or practices occur, in or while attending an educational institution or physically off the school premises.

These recommendations are being made with a proper perspective of the fine and sensitive balance that exists between the function of the judiciary and that of the legislative.

Unless and until the legislature so acts, Courts will be seriously handicapped in an attempt to enforce penal statutes that contain the vagueness and indefiniteness of Section 1030.[70]

These suggestions, if adopted in legislative amendments, would have made clear at least two points. First, only those individuals who "planned" the hazing activity or "participated" in the hazing could be the target of a hazing prosecution. Second, the testimony of those hazed would not require corroboration since they would not be deemed "accomplices," nor could they

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[70] *Id.* at 289.

"aid or abet" the crime of hazing by virtue of being hazed. These suggestions have not been adopted by any legislature to date. Even when the New York legislature amended its anti-hazing statute in 1968 and 1988, these provisions were not included.

Even if the suggestions were adopted, it would not have solved all drafting problems. In spite of the recommendations of the *Lenti II* court to clarify and "make more enforceable" the anti-hazing statutes, these recommendations, even if implemented, would not have affected those activities which did not "shock the public conscience and morals" or "subject an individual to personal indignity or ridicule."[71] Further, some statutes require that the initiate being hazed attain a certain mental state before a crime is committed.[72] An initiate may so believe in the propriety and sanctity of the acts being asked of him or her that the requisite mental state for conviction may never be attained. An array of possibilities arises which approach infinity in meaning.

The ambiguity is perhaps greatest when physical contact, injury or harm is threatened but not performed on the alleged hazee. Some states attempt to eliminate the lack of clarity by expanding the list of conduct which constitutes hazing. The ambiguities remain because it is questionable whether one must look to the intent of the hazer or the resulting state of mind of the hazee in order to determine whether the outlawed activity has occurred. For example, "intimidation" is criminal hazing in Arkansas and Texas.[73] Has hazing occurred if the hazee does not believe he or she has been "intimidated" even though the alleged hazer may have intended to "intimidate"? The same sort of ambiguity exists in numerous statutory instances of identified hazing activity since the resulting state of mind of the hazee determines whether a crime may have taken place.[74]

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[71] *Id.* at 288-89.

[72] *See* ARK. CODE ANN. § 6-5-201(a)(1) (1987) (to "intimidate" students is crime).

[73] ARK. CODE ANN. § 6-5-201(a)(1) (1987); TEX. EDUC. CODE ANN. § 4.51(6)(D) (Vernon 1991).

[74] Threatening "social or other ostracism," submission to "shame," and acts to humble pride are hazing in Arkansas, ARK. CODE ANN. § 6-5-201(a)(1)(3) (1987) and Texas, TEX. EDUC. CODE ANN. § 4.51(6)(D) (Vernon 1991). Arkansas is alone in defining hazing as including the "submission of students to ignominy . . . or disgrace among fellow stu-

There are other forms of conduct which various states have

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dents . . . playing of abusive or truculent tricks to frighten or scare [a student] . . . acts to . . . stifle ambition, impair courage, or to discourage [one] from remaining in school." ARK. CODE ANN. §§ 6-5-201(a)(1)-(3) (1987). In contrast, the Texas provision provides that in the state of Texas, hazing occurs when one does acts which are "expected to cause a student to leave [an] organization or [school] rather than submit to [these] acts." TEX. EDUC. CODE § 4.51(6)(D).

Connecticut provides that "requiring indecent exposure" is hazing. CONN. GEN. STAT. ANN. § 53-23a(a)(1)(A) (West Supp. 1990).

"[S]leep deprivation" is hazing in Connecticut, CONN. GEN. STAT. ANN. § 53-23a(a)(1)(B) (West Supp. 1990), Florida, FLA. STAT. ANN. § 240.262(1) (West 1989), Massachusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Pennsylvania, 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990), Rhode Island, R.I. GEN. LAWS § 11-21-1 (Supp. 1990) and Utah, UTAH CODE ANN. § 76-5-107.5 (1)(e) (1990).

"[E]xtended isolation from social contact" (undefined in any state in which this conduct constitutes hazing) is hazing in Connecticut, CONN. GEN. STAT. § 53-23a(a)(1)(B), Florida, FLA. STAT. § 240.262(1) (West 1990), Massachusetts, MASS. GEN. L. ch. 269, § 17, Pennsylvania, 24 PA. § 5352 (1986), and Utah, UTAH CODE ANN. § 76-5-107.5(1)(e). These provisions do not define this, but they do indicate that the isolation from social contact must be forced.

Connecticut and Oregon indicate that it is hazing to "[confine one] to unreasonably small, unventilated, unsanitary, or unlighted areas." CONN. GEN. STAT. ANN. 53-23a(a)(1)(C) (West Supp. 1990); OR. REV. STAT. § 163.197(2)(h) (1990). In contrast, in Texas, it is hazing merely to "confine one to a small space." TEX. EDUC. CODE ANN. § 4.51(6)(B) (Vernon 1991). In Wisconsin, confinement is hazing only if "forced." WIS. STAT. ANN. § 948.51(2) (West Supp. 1990).

"Forced calisthenics" are illegal in Florida, FLA. STAT. § 240.262(1) (West 1990), Massachusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Pennsylvania, 24 PA. CONS. STAT. § 5352 (Purdon Supp. 1990), Rhode Island, R.I. GEN. LAWS § 11-21-1 (1990), Texas, TEX. EDUC. CODE ANN. § 4.51(6)(B) (Vernon 1991), and Utah, UTAH CODE ANN. § 76-5-107.5(1)(c) (1990). The Texas statute does not indicate that the performance of calisthenics has to be "forced." For a discussion of the conflict between the hazee's consensual conduct and forced conduct, see *infra* note 152 and accompanying text.

"Exposure to the elements" is proscribed in Florida, FLA. STAT. ANN. § 240.262(1) (West 1990), Massachusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Missouri, MO. ANN. STAT. § 578.360(2)(a) (Vernon Supp. 1991), Pennsylvania, 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990), Rhode Island, I.R. GEN. LAWS § 11-21-1 (1990), Texas, TEX. EDUC. CODE ANN. § 4.51(6)(A) Vernon 1991), and Utah, UTAH CODE ANN. § 76-5-107.5(1)(c) (1990).

"Brutal treatment" is hazing in Masschusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Missouri, MO. ANN. STAT. § 578.360(2)(a) (Vernon Supp. 1991), Pennsylvania, 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990), Rhode Island, R.I. GEN. LAWS § 11-21-1 (1900), Texas, TEX. EDUC. CODE ANN. § 4.51(6)(A) (Vernon 1991), Utah, UTAH CODE ANN. § 76-5-107.5(1)(c) (1990), and Wisconsin, WIS. STAT. ANN. § 948.51(2) (West Supp. 1990). "Brutal treatment" is not defined in the states which provide that such conduct constitutes hazing. In Missouri and Texas, "physical brutality" is used instead of "brutal treatment." This author deems the usage synonymous.

"[C]alisthenics" and requiring "total or substantial nudity on the part of any per-

defined as hazing. "Wearing or carrying any obscene[75] or physically burdensome article,"[76] "[p]articipation by [any] person in boxing matches or other physical contests,"[77] "[t]ransportation and abandonment of person[s],"[78] and "[a]ssignment of pranks to be performed"[79] are all forms of hazing in Oregon. "Destruction or removal of public or private property" constitutes hazing in Pennsylvania[80] and Utah.[81] Texas provides that illegal hazing includes "electronic shocking,"[82] "placing of a harmful substance on the body,"[83] "any type of physical activity"[84] and "any activity . . . require[d] [of a] student . . . [in] violation of [Texas's] Penal Code."[85]

In states where there is no criminal anti-hazing statute, to be illegal, "hazing" activities would have to fit into a criminal statutory category which proscribes such conduct and provides penalties or punishment therefor.[86] Criminal battery and assault would be the likely candidates under which many of the targeted activities would fall. However, many others simply would not be illegal. Absent a specific statute, it would not be a crime to

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son" are hazing in Oregon. OR. REV. STAT. ANN. § 163.197(2)(a) (1990). Some states, conversely, only outlaw "forced calisthenics." "Substantial nudity" is not defined under the Oregon statute.

In Texas, it is hazing to "subject a student to an unreasonable risk of harm" or perform any "act which affects the dignity of [a] student." TEX. EDUC. CODE ANN. § 4.51(6)(B),(D).

Virginia provides that "any mistreatment" is hazing. VA. CODE ANN. § 18.2-56 (1988).

[75] OR. REV. STAT. ANN. § 163.197(2)(d) (1990).

[76] *Id.*

[77] *Id.* § 163.197(2)(f).

[78] *Id.* § 163.197(2)(g).

[79] *Id.* § 163.197(2)(i).

[80] 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990).

[81] UTAH CODE ANN. § 76-5-107.5(1)(b) (1990).

[82] TEX. EDUC. CODE ANN. § 4.51(6)(A) (Vernon 1991).

[83] *Id.*

[84] *Id.* § 4.51(6)(B).

[85] *Id.* § 4.51(6)(E).

[86] Alabama, ALA. CODE § 16-1-23(f) (1987), Arkansas, ARK. CODE ANN. § 6-5-201 (1987), Connecticut, CONN. GEN. STAT. ANN. § 53-23a(a)(2)(e) (West Supp. 1990), Kentucky, KY. REV. STAT. ANN. § 164.375 (Baldwin 1990), Maine, ME. REV. STAT. ANN. tit. 20-A, § 10004(3)(C) (Supp. 1990), Pennsylvania, 24 PA. CONS. STAT. ANN. § 5354(4) (Purdon Supp. 1990), and Texas, TEX. EDUC. CODE ANN. § 4.51 (Vernon 1991) provided that their statutory provisions on hazing are not to be "construed as in any manner affecting or repealing any law . . . respecting any other criminal offense."

"stifl[e] one's ambition,"[87] "to discourage [one] from remaining in . . . school,"[88] to deprive one of sleep,[89] to require one to perform calisthenics,[90] to perform an act as a pastime or amusement to ridicule another,[91] to expose one to the weather,[92] to wear or carry an "obscene or physically burdensome article,"[93] or to be assigned pranks to perform.[94] In such cases, consent or acquiescence to the acts being performed on or with the initiate would certainly bar prosecution. The mere occurrence of one of these events would not be sufficient to convict one for hazing. The state must establish the requisite mens rea for hazing. In most states, a person may not willfully, knowingly, intentionally or recklessly haze.[95]

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[87] ARK. CODE ANN. § 6-5-201(a)(3) (1987).

[88] *Id.*

[89] CONN. § 53-23a(a)(1)(b); FLA. STAT. ANN. § 240.262 (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 16 (West 1990); OR. REV. STAT. ANN. § 163.197 (1990); 24 PA. CONS. STAT. ANN. 5353 (Purdon Supp. 1990); R.I. GEN. LAWS § 11-21-1 (Supp. 1990); and UTAH CODE ANN. § 76-5-107.5 (1990).

[90] OR. REV. STAT. ANN. § 163.197 (1990).

[91] ILL. REV. STAT. ch. 144, para. 222 (Smith-Hurd 1986).

[92] MASS. GEN. LAWS ANN. ch. 269, § 16 (West 1990); Mo. ANN. STAT. § 578.360(2)(a) (Vernon Supp. 1991); R.I. GEN. LAWS § 11-21-1 (Supp. 1990); TEX. EDUC. CODE ANN. § 4.51 (Vernon 1991).

[93] OR. REV. STAT. ANN. § 163.197 (1990).

[94] *Id.*

[95] Alabama law indicates that hazing is "any willful action . . . which recklessly or intentionally endangers." ALA. CODE § 16-1-23 (1987). Arkansas provides that hazing is "[a]ny willful act" which is done for the purpose of committing any of the various acts defined as hazing. ARK. CODE ANN. § 6-5-201 (1987). In Connecticut, it is hazing to "recklessly or intentionally endanger." CONN. GEN. STAT. ANN. § 53-23a(a)(1) (West Supp. 1990). In Florida, hazing is "any action or situation which recklessly or intentionally endangers." FLA. STAT. ANN. § 240.262 (West 1989). Indiana requires an act to be performed "recklessly, knowingly, or intentionally. IND. CODE ANN. § 35-42-2-2(b) (Burns Supp. 1990). In Kentucky, "reckless or intentional [endangerment]" is the required mens rea. KY. REV. STAT. § 164.375 (Baldwin 1990). Maryland law provides that "any act . . . which recklessly or intentionally endangers others is subject to prosecution for hazing. MD. ANN. CODE art. 27, § 268H (1987). In Massachusetts, the act must reach willful or reckless endangerment. MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990). In Mississippi, "[a] person is guilty of hazing . . . when . . . he intentionally or recklessly engages in conduct" which amounts to hazing. MISS. CODE ANN. § 97-3-105 (Supp. 1990). In Missouri, any "willful act . . . [which] recklessly endangers" may be hazing. MO. ANN. STAT. § 578.360(2) (Vernon Supp. 1991). "[I]ntentionally or recklessly [engaging] in conduct which creates a substantial risk of . . . injury" may be criminal hazing in New York. N.Y. PENAL LAW § 120.16 (McKinney Supp. 1991). In Ohio, the "reckless participation" in hazing is subject to prosecution. OHIO REV. CODE ANN. § 2903.31(B)(1) (Anderson 1987).

A. *Mens Rea in Hazing Incidents*

The mindset of one who engages in activities associated with initiation rituals must be determined in a criminal prosecution for hazing. There is a question of whether a person accused of hazing has sufficient capacity to form the requisite mens rea required of one so charged. This is particularly true considering that many individuals involved in hazing events are below the age of majority. Often, those hazing are part of a group which performs ritualistic, traditional, or customary practices for initiation purposes. The presence or influence of the group may affect the ability of an individual, particularly a youthful individual, to control his impulse. In *Rupp v. Bryant*,[96] the court recognized that "boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit [exist] tend naturally to relax vigilance."[97] The influence of the group is not limited to youthful offenders. It has been noted that whenever individuals congregate and act in groups, individuals may lose their good judgment. One author explains:

> [W]hat seems most shocking about the death of a student during initiation rites is how three, 10, 30 or more group members can watch a hostile act of aggression without interfering. Although it seems obvious that the more people who watch a victim in distress, the more likely someone will help what really happens is exactly the opposite. If each member of a group of bystanders is aware that other people are also present, he will be less likely to notice the emergency, and less likely to act

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"Intentional" hazing is outlawed in Oregon. OR. REV. STAT. ANN. § 163.197(1) (1990). In Pennsylvania, "recklessly or intentionally [endangering]" may be hazing. 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990). Rhode Island law prohibits acts which "wilfully endanger." R.I. GEN. LAWS § 11-21-1 (Supp. 1990). In Texas, it may be criminal hazing to perform an act which is "intentional, knowing, or reckless." TEX. EDUC. CODE ANN. § 4.51(6) (Vernon 1991). Utah prohibits acts which "recklessly or intentionally endanger" a person or result in the "willful" destruction or removal of property. UTAH CODE ANN. § 76-5-107.5(1)(a) -(b) (1990). In Wisconsin, no person may "intentionally or recklessly" endanger another. WIS. STAT. ANN. § 948.51 (West Supp. 1990).

[96] 417 So. 2d 658, 667 (Fla. 1982) (school principal and faculty advisor responsible for injury occurring to pledge as result of hazing by high school fraternity where, given reputation for hazing by fraternity and youthful age of participants, defendants should have foreseen dangers which awaited pledges).

[97] *Bryant*, 417 So. 2d at 667.

> even if he thinks there is an emergency. . . . The judgment of members and pledges becomes clouded and inhibitions disappear.[98]

Not only do inhibitions disappear, but the hazing seems to parallel sport. In fact, many statutes define hazing as acts performed "as a pastime or amusement . . . [to] ridicule" another.[99] If this is in fact the case, the mental state of one engaged in hazing for the purpose of initiation into an organization is more akin to a sports participant rather than a common criminal:

> A player can injure another player during a game intentionally, with reckless disregard or negligently. An intentional act is one in which a player intends to commit an act and by that act to injure an opponent. A negligent act consists of mere inadvertence, failure to act reasonably under the circumstances or failure to take reasonable precautions to avoid injuring another person.
>
> Reckless disregard falls somewhere between an intentional act and a negligent act. Reckless disregard exists when a player knows an act is harmful and intends to commit the act, but does not intend by the act to harm an opponent; it further involves a player's knowledge of the danger and risk, which are substantially greater than in the case of negligence.[100]

Just like in sports, seldom does a person engaged in hazing practices have a specific intent to harm or kill the person being initiated.[101] Injuries occur because one has failed to take measures to minimize the risk of injury. There may even be instances where

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[98] Nuwer, *Dead Souls of Hell Week*, HUM. BEHAV., Oct. 1978, at 53, 56.

[99] *E.g.*, ILL. REV. STAT. ch. 144, para. 222 (Smith-Hurd 1986).

[100] Narol, *Courts Define Standard of Care in Player vs. Player Litigation*, SPORTS LAW, Nov. 1989, at 23.

[101] *See* Raphael, *supra* note 6, at 91-92. Raphael states:

> In the past few years there have been several deaths, duly reported in the media, attributed to fraternity initiations: young men falling off cliffs and suffocating inside the trunks of cars. These tragedies are clearly not intentional, nor are they indications of weakness or failure on the part of the men who are killed; they are caused by rank amateurs who are not sufficiently versed in how to conduct the rituals. The college boys are "playing initiation," much as small children might "play house" or "play doctor," only this time the stakes of the game, or at least the dangers, are much more serious.

Id. For this reason, this paper does not relegate much attention to mens rea.

the individual is not even aware that a danger of injury is present. This may not be relevant if the defendant hazer should have known that there was a substantial risk of injury and failed to take precautions against its occurrence. The risk of injury may further be hidden to a youthful and immature initiator by the initiate's voluntary and willful participation in, acquiescence, or consent to the hazing ritual.

B. The Problem of Consent to Hazing By Initiates

In the context of hazing, consent poses interesting problems. States deal with this issue differently. In New York, for example, *Lenti II* suggested that the consent of the victim should not prevent a prosecution for hazing where the acts are "sadistic, barbaric and immoral."[102] The *Lenti II* court stated, "Consent of the pledges certainly should not be a bar to prosecution; intelligent consent cannot be a defense when the public conscience and morals are shocked. [N]or should participation by pledges deem them accomplices."[103]

Despite the recommendations of the Court in *Lenti II*, the Legislature did not include any provisions in its post-*Lenti* revisions of New York's anti-hazing laws which would have abrogated the consent defense.[104] In contrast, in California and Pennsylvania, "any activity . . . [upon] which the initiation or admission into or affiliation with a university organization is directly or indirectly conditioned shall be presumed to be a 'forced' activity, the willingness of an individual to participate in such activity notwithstanding."[105] Georgia[106] and Wisconsin[107] statutes indicate that to haze means to subject a student to an activity which endangers or is likely to endanger the physical health of a student, regardless of a student's willingness to participate in such activity. In Indiana, the consent of the alleged

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[102] *Lenti*, 260 N.Y.S.2d at 288.

[103] *Id.* at 287 (citation omitted).

[104] N.Y. PENAL LAW § 120.16-17 (McKinney Supp. 1991).

[105] CAL. EDUC. CODE § 32050 (West Supp. 1991); 24 PA. CONS. STAT. ANN. § 5352 (Purdon Supp. 1990).

[106] GA. CODE ANN. § 16-5-61(a)(4) (Supp. 1990).

[107] WIS. STAT. ANN. § 948.51(2) (West Supp. 1990).

hazee is irrelevant.[108] Maryland mandates that "[t]he implied or expressed consent of a student to hazing may not be a defense."[109] Similarly, Massachusetts provides that "consent shall not be available as a defense to any prosecution [for hazing]."[110]

In states which have no statutory provision defeating the consent defense, or in states which have no anti-hazing statute, the consent-to-hazing issue remains problematic. In criminal law, it is widely, but perhaps incorrectly, perceived that consent to an otherwise illegal act is typically a legitimate defense to prosecution. It has been suggested that the legal consequence of consent by a victim-plaintiff to a tortious act differs from consent by a victim to the commission of a crime:

> Some courts have allowed the defense of consent in civil suits,[111] while denying it in criminal prosecutions for battery.[112]

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[108] IND. CODE ANN. § 35-42-2-2 (Burns Supp. 1990) indicates, in pertinent part, that " 'hazing' means forcing or requiring another person [to risk injury] with or without the consent of the other person."

[109] MD. ANN. CODE, art. 27, § 268H (1987).

[110] MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990).

[111] The civil side equivalents of consent are the defenses of assumption of the risk and contributory negligence. In Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 490 (S.C. Ct. App. 1986), the social fraternity was held liable for the death of a pledge. In refuting the defendant's claim that the plaintiff assumed the risk of the defendant's conduct, the court intimated that a plaintiff can only assume the risk of dangers to which he is fully aware. *Id.* at 495. Accordingly, where plaintiff and other initiates "throughout the initiation process [were] plied . . . with alcohol" and were encouraged through "song, ceremony, ridicule, subterfuge, and peer pressure to drink excessive amounts of alcohol within a short period of time," the court ruled:

> [T]he plaintiff voluntarily assumed the risk of the dangers imposed by a situation involving verbal and physical hazing and consumption of alcohol to the point of intoxication; however, [the plaintiff] did not as a matter of law freely and voluntarily with full knowledge of its nature and extent incur the risk of the dangers created by Sigma Nu's action of promoting *extreme* intoxication.

Id. at 494-95 (emphasis added). Likewise, in Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753 (1985), the court, in holding a fraternal organization liable for injuries suffered by a pledge during an initiation ceremony, said:

> [T]he injured party must have "freely and voluntarily exposed himself to a known danger of which he understood and appreciated the danger."
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> . . . .
>
> . . . Here, while [the plaintiff] was aware that he was participating in a hazing type activity, the jury could find from the evidence that his knowledge did not extend to a danger understood and appreciated by him.

Easler, 329 S.E.2d at 756 (citations omitted).

In refusing to hold a fraternity liable for the death of a pledge on social host

> According to these courts, there are two different interests at stake. While criminal law is designed to protect the interests of society as a whole, the civil law is concerned with enforcing the rights of each individual within the society. So, while the consent of the victim may relieve [a] defendant of liability in tort, this same consent has been held irrelevant in a criminal prosecution, where there is more at stake than a victim's rights.[113]

Thus, in *State v. Brown*, the court held that consent was not a legitimate defense to a charge of assault and battery, stating that "since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, *especially where the battery is a substantial or severe one.*"[114] In states that have no statutes governing hazing, consent may provide an effective defense to a defendant charged with acts commonly associated with hazing but amounting to "simple" assault or battery. Similarly, in states which have statutes gov-

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grounds, the concurring opinion in another case emphasized:

> [T]he deceased willingly participated in a drinking party and died as a result of his own indulgence. The plaintiffs' attempt to personalize the national and local fraternity organizations and to indict them as the causative agents in the tragedy are highly artificial and do not mask the fact that the 19 year old decedent simply drank himself to death.

Andrews v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 554 (Mo. 1987) (Blackmun, J., concurring).

[112] *E.g.*, Wright v. Starr, 42 Nev. 441, 179 P. 877, 878 (1919). ("[c]onsent to a battery is illegal as against the state . . . .").

[113] State v. Brown, 143 N.J. Super. 571, 364 A.2d 27, 28 (N.J. Super. Ct. Law Div. 1976), *aff'd*, 154 N.J. Super. 511, 381 A.2d 1231 (N.J. Super. Ct. App. Div. 1977).

[114] *Brown*, 364 A.2d at 28 (emphasis added). In *Brown*:

> [D]efendant and victim] had an understanding to the effect that if [the victim] consumed any alcoholic beverages (and/or became intoxicated), [defendant] would punish [victim] by physically assaulting her. Testimony revealed that the victim was an alcoholic. On the day of the alleged crime, [victim] indulged in some spirits, apparently to [the defendant's] dissatisfaction. As per their agreement, defendant sought to punish [victim] by severely beating [victim] with his hands and other objects.

Id. at 28. On appeal, the court emphasized that one could not consent to an "atrocious assault," but specifically found "no necessity . . . to decide whether consent of the victim might constitute a complete defense to [a simple assault and battery either in the civil (common law) or disorderly persons sense]." State v. Brown, 154 N.J. Super. 511, 381 A.2d 1231 (N.J. Super. Ct. App. Div. 1977), *aff'g*, 143 N.J. Super. 571, 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976).

erning hazing, an effective defense may yet be presented if the relevant statute does not negate the common law defense of consent.

Those who are victims of hazing are oftentimes willing participants in the activity since it is they who seek admission into a particular organization. The alleged hazees generally understand and anticipate that the act or acts performed on or with them is a prerequisite to entry into the organization. If an alleged hazee does not believe he or she was "forced," then there is a proper question raised as to whether that alleged hazee consented to the act or acts. The hazer's intent versus the hazee's belief presents a dilemma in states which criminalize "forced" hazing activity. It would seem that whether "forced" activity has occurred depends on the state of mind of the hazee. If the hazee does not believe that he or she has been "forced," it would seem that the state would be incapable of proving the requisite element of the crime of hazing in those relevant states.[115]

A question remains, however, whether the consent defense is available where an initiate consents to hazing activities which do "shock the conscience of the court," constitute "atrocious assault and battery," violate statutes designed to protect life, limb or property, or which are not "sadistic, barbaric, immoral." It

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[115] *See supra* note 74, for states in which "forced calisthenics" are illegal. "Forced consumption of any food, liquor, drug or other substance" is hazing in Florida, FLA. § 240.262(1) (West 1990), Kentucky, KY. REV. STAT. ANN. § 164.375 (Baldwin 1990), Massachusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Missouri, MO. ANN. STAT. § 578.360(2)(a) (Vernon Supp. 1991), Pennsylvania, 24 PA. CONS. STAT. ANN. 5352 (Purdon Supp. 1990), Rhode Island, R.I. GEN. LAWS § 11-21-1 (Supp. 1990), Texas, TEX. EDUC. CODE ANN. § 4.51(6)(C) (Vernon 1991), Utah, UTAH CODE ANN., § 76-5-107.5(1)(d) (1990), and Wisconsin, WIS. STAT. ANN. § 948.51 (West Supp. 1990). Any "forced physical activity which could adversely affect the physical health or safety" of another is a crime in Florida, FLA. § 240.262(1) (West 1990), Massachusetts, MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990), Pennsylvania, 24 PA. CONS. STAT. ANN. 5352, Rhode Island, R.I. § 11-21-1, Texas, TEX. EDUC. § 4.51(6)(B), Utah, UTAH [[76-5-107.5(1)(d), and Wisconsin, WIS. STAT. ANN. § 948.51(2) (West Supp. 1990). "Compelled personal servitude by [an alleged hazer]" is hazing in Oregon. OR. REV. STAT. ANN. § 163.197(2)(j) (1990). "Forced conduct . . . resulting in extreme embarrassment" is hazing in Florida, FLA. § 240.262(1), Pennsylvania, 24 PA. CONS. STAT. ANN. § 5352, and Utah, UTAH CODE ANN. § 76-5-107.5(1)(e) (1990). "Extreme embarrassment" is not defined in those states making its occurrence hazing. Missouri uniquely provides that "forced smoking" and "forced chewing of tobacco" are hazing. MO. § 578.360(2)(a). "Forced confinement" is illegal hazing in Wisconsin. WIS. § 948.51(2).

seems that the weight of present judicial authority holds that consent cannot be given to acts which "shock the conscience of the court," or acts which are "sadistic, barbaric or immoral." Yet many practices involved in hazing neither "shock the conscience of the court," nor are they "sadistic, barbaric or immoral," since in the absence of statute, they may not be in themselves criminal. Some of these activities may be criminally prohibited in certain states but are not subject to regulation in others, particularly in a hazing context. These acts include "intimidation,"[116] "threatening social or other ostracism," "submission to ignominy, shame or disgrace among fellow students," "playing of abusive or truculent tricks to frighten or scare," "acts to humble pride, stifle ambition, impair courage, or discourage [one] from remaining in school,"[117] "sleep or rest deprivation,"[118] "extended isolation from social contact,"[119] "exposure to weather,"[120] mere "calisthenics," "wearing or carrying of any physically burdensome article,"[121] "participation by persons in boxing matches or other physical contests,"[122] "transportation and abandonment of persons or assignment of pranks to be performed,"[123] and "removal of private property."[124] This list is in no way limited since

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[116] ARK. CODE ANN. § 6-5-201(a)(1) (1987); TEX. EDUC. CODE ANN. § 4.51(6)(D) (Vernon 1991).

[117] ARK. CODE ANN. § 6-5-201(a)(1) (1987).

[118] CONN. GEN. STAT. ANN. § 53-23a (West Supp. 1990); FLA. STAT. ANN. § 240.262 (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990); OR. REV. STAT. ANN. § 163.197 (1990); 24 PA. CONST. STAT. ANN. § 5353 (Purdon Supp. 1990); R.I. GEN. LAWS § 11-21-1 (Supp. 1990); UTAH CODE ANN. § 76-5-107.5 (1990).

[119] CONN. GEN. STAT. ANN. § 53-23a (West Supp. 1990); FLA. STAT. ANN. § 2401.262 (West 1989); MASS. GEN. LAWS ANN. ch. 269 (West 1990), § 16; OR. REV. STAT. ANN. § 163.197 (1990); 24 PA. CONST. STAT. ANN. § 5353 (Purdon Supp. 1990); UTAH CODE ANN. § 76-5-107.5 (1990).

[120] MASS. GEN. LAWS ANN. ch. 269, § 16 (West 1990); MO. ANN. STAT. 578.363 (Vernon Supp. 1991); R.I. GEN. LAWS § 11-21-1 (Supp. 1990); TEX. EDUC. CODE ANN. § 4.51 (Vernon 1991).

[121] OR. REV. STAT. ANN. § 163.197 (1990).

[122] *Id. But cf.* State v. Brown, 143 N.J. Super. 571, 364 A.2d 27, 29 (N.J. Super. Ct. Law. Div. 1976), *aff'd*, 154 N.J. Super. 511, 381 A.2d 1231 (N.J. Super. Ct. App. Div. 1977) (noting, under Vermont law, defendant's "consent to engage in assaultive conduct (sparring and boxing) constituting a breach of the peace . . . does not give character to [the] acts and prevent [them from] becoming a breach of the peace").

[123] OR. REV. STAT. ANN. § 163.197 (1990).

[124] 24 PA. CONST. STAT. ANN. § 5353 (Purdon 1990); UTAH CODE ANN. § 76-5-107.5 (1990).

those who haze never suffer for ideas in contriving new forms of hazing. This brings to light the point that not all hazing is violative of the public order.

VI. Hazing in Non-Collegiate and Non-Fraternity Settings

Except for New York's anti-hazing statute, all of the states with criminal anti-hazing statutes focus on hazing during initiation into student organizations or organizations affiliated with educational institutions. Non-collegiate, non-fraternity initiations are performed as a rite of passage into occupational settings or positions, boy scout troops, or professions, and may increase an initiate's risk of incurring physical or mental injury. As a result of insufficient statutory breadth, many non-collegiate, non-fraternity hazing incidents which result in physical or mental injury would not be covered by most anti-hazing statutes.

A. The Student Requirement

One could probably reasonably hypothesize that most collegiate hazing activity is commonly committed by students against other students in connection with admission into a fraternity or sorority. By no means, however, is hazing limited to this scenario. Hazing can be committed against nonstudents by students or nonstudents.[125] In those states which definitionally require that the hazee be a student, the absence of student status may arguably present a defense to prosecuting certain alleged hazers.[126] In urban street gangs, hazing may be a ritual to admission.[127] In adult organizations, clubs, and fraternal lodges,

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[125] For example, graduate alumni fraternity members may haze either students enrolled in a university or individuals who are not enrolled in the educational institution.

[126] In the event that the alleged hazing activity proximately causes injury to the hazee in the non-fraternity related cases, a workers' compensation claim may arise against the employer if the activity is deemed to be unintentional. If viewed as intentional conduct, then the employer and responsible co-employees could perhaps be sued for an intentional tort under common law tort theories.

[127] In the motion picture, *Colors* (Orion 1988), a Hispanic street gang, the initiate was brutally beaten by the gang members as a ritual to entry.

hazing can take place[128] and, in some parts of the country, might be expected. Some form of hazing occurs in the United States Armed Forces as a consensual and incidental initiation rite of passage associated with being promoted from one rank to another.[129] Also, in the Navy, it is traditional for sailors who have never had the experience of crossing the equator at sea to be hazed in a "pollywog" ceremony whenever the equator is crossed.[130] In many business operations and professions, new employees are hazed.[131]

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[128] *E.g.*, *Easler*, 329 S.E.2d at 753 (adult fraternal lodge held liable for injuries sustained by initiate during initiation ceremonies of lodge).

[129] It was reported to me by a naval chief petty officer, who requested anonymity, who served aboard the *U.S.S. Duluth*, a military transport vessel, that when he was promoted to chief petty officer, one of two such officers aboard this vessel, in order to be fully accepted into this select group he was stripped naked, compelled to perform numerous ritualistic acts such as being paddled and sitting on ice, and "roasted" by the officers on board. In other words, he was hazed.

[130] The same chief petty officer aboard the *U.S.S. Duluth* related this tradition to me. He did indicate that participation in this activity was totally consensual. The veracity of the event is corroborated in *House Beautiful*, although in a different context:

> [T]he Equator is more than a geographical demarcation. It's a major travel experience . . . [I]t's on the big cruise ships . . . that crossing the Equator becomes a sizable ceremony, part tradition, part the ingenuity of the current passenger list . . .
>
> Like all initiations, this one is calculated to inspire dread. Only a few days out of New Orleans or New York, bound for Rio or Buenos Aires, you become aware that you are not really Mrs. Smith or Mr. James, but a mere pollywog, a landlubber. As such, you're headed for whatever joyful victimizing that can be devised by those who already belong to the Shellback few. . . . And then, with all hands on deck, the Ceremony. The royal Shellback dignitaries and their minions are costumed and waiting, and you hear the anguished cries of their first blind-folded victims broadcast through the ship's loudspeaker. At most you'll be required to kiss a dead fish standing in for the royal toe, await your turn sitting on a cake or ice, or spend much time wearing off a coat of mercurochrome or reconditioning your wave after a shampoo of starch and spaghetti. But even so, you'll never be quite the same again. Back at the office or in your kitchen, you'll be aware of new stature. You are a Shellback. You have crossed the Equator.

Viva Neptunus Rex!, HOUSE BEAUTIFUL Dec. 1951, at 214. This ritual has its origin in the Navy.

[131] *See supra* notes 9-10 and accompanying text. It has been reported that "[p]eople who are being subjected to harmless hazing . . . include the hospital orderly who is asked to find a fallopian tube or the young lawyer who is assigned to research a nonexistent case." *Smiling Through the Haze*, WORKING WOMAN, May 1984, at 33.

B. Job-Related Hazing

The magnitude and existence of job-related hazing should not be unduly minimized. Although the author has not found any cases concerning a criminal prosecution for job-related hazing subjecting the initiate to a substantial risk of physical or mental injury, hazing has been the source of litigants' civil complaints. For instance, in *Vaughn v. Offshore Pool Co.*,[132] the plaintiff sued for racial discrimination, but the catalyst for the litigation was the physical hazing he received from his fellow workers.[133] Since the hazing issue was not squarely before the *Vaughn* court, the ensuing mental anguish of the plaintiff and others similarly situated can only be imagined.

Not all states have limited the definition of hazing to students.[134] In some states, it may be necessary to prove that the alleged hazing occurred in connection with an organization.[135] Thirteen states,[136] by definition, criminalize suspected hazing ac-

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[132] 683 F.2d 922 (5th Cir. 1982).

[133] *Vaughn*, 683 F.2d at 923.

[134] Connecticut law defines hazing as "any action which . . . endangers the health or safety of a person." CONN. GEN. STAT. ANN. § 53-23a(a)(1) (West Supp. 1990). Therefore, one who hazes another "person" in Connecticut is subject to prosecution even though the alleged hazee is not a student. Likewise, Illinois law provides that hazing occurs when "any student, scholar or individual" is "held up to ridicule for the pastime of others." ILL. REV. STAT. ch. 144, para. 222 (Smith-Hurd 1986). Indiana outlaws hazing against "another person." IND. CODE ANN. § 35-42-2-2 (Burns Supp. 1990). The Kentucky Legislature instructs the Board of Trustees to adopt anti-hazing policies "to govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on [school] campuses and property." KY. REV. STAT. ANN. § 164.375 (Baldwin 1990). Massachusetts protects the health of "any student or other person." MASS. GEN. LAWS ANN. ch. 269, § 17 (West 1990). In Missouri, hazing is a "willful act . . . directed against a student or a prospective member of an organization operating under the sanction of an educational institution." MO. ANN. STAT. § 578.360(2) (Vernon Supp. 1991). Oregon outlaws hazing directed at "any member, potential member or person pledged." OR. REV. STAT. ANN. § 163.197(1) (1990). Rhode Island prohibits the endangerment of the health "of any student or other person." R.I. GEN. LAWS § 11-21-1 (Supp. 1990).

[135] Some states require that the organizations be "student" organizations, or that the organizations operate with the sanction of the university. In Louisiana, the organization must be a "fraternal organization in any educational institution supported wholly or in part by public funds." LA. REV. STAT. ch. 17, § 17:1801 (West 1982). Other states indicate that any organization may suffice.

[136] *See generally* CONN. GEN. REV. STAT. ANN. § 53-23a (West Supp. 1990); CAL. EDUC. CODE § 32052 (West Supp. 1991); FLA. STAT. ANN. § 240.262(1) (West 1989); GA. CODE ANN. § 16-5-61(b) (Supp. 1990); LA. REV. STAT. § 17:1801 ch. 17 (West 1982); KY.

tivities if the purpose of such activities is initiation into or continued membership[137] in an organization. It is hazing in New York if "a substantial risk of . . . injury [is created] to [another] person or a third person."[138] The New York statute, which would address non-student hazing in connection with apparently any "organization" whether work-related or not, provides the following:

> Section 120.16 *Hazing in the first degree*
>
> A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.
>
> Hazing in the first degree is a class A misdemeanor.
>
> Section 120.17 *Hazing in the second degree*
>
> A person is guilty of hazing in the second degree when, in the course of another person's initiation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.
>
> Hazing in the second degree is a violation.[139]

The New York anti-hazing statute is sufficiently broad to criminalize non-collegiate, non-fraternity initiations which subject initiates to "substantial risk of physical injury."[140] This would cover the situation encountered in *Vaughn* where the roustabout was hazed as the new employee's rite of passage.[141] Under New York law, this would be a crime. A successful prose-

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Rev. Stat. Ann. § 164.375(1) (Baldwin 1990); Mo. Ann. Stat. § 578.360(2); N.Y. Penal Law § 120.16 (McKinney Supp. 1991); Or. Rev. Stat. Ann. § 163.197 (1990); 24 Pa. Cons. Stat. Ann. § 5352 (Purdon Supp. 1990); Tex. Educ. Code Ann. § 4.51(6) (Vernon 1991); Utah Code Ann. § 76-5-107.5(1) (1990); Wis. Stat. Ann. § 948.51 (West Supp. 1990).

[137] When a pledge is the plaintiff, the issue of membership in the fraternotiy may be a question for the jury. *Easler*, 329 S.E.2d at 756.; Note, *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 Rev. of Litigation 191, 196 (1988).

[138] N.Y. Penal Law § 120.16 (McKinney Supp. 1991).

[139] *Id.* § 120.16 - 120.17.

[140] *Id.* The statute as written would not cover mental injuries or acts which place another person at substantial risk of incurring mental injuries. *Id.*

[141] *Vaughn*, 683 F.2d at 923.

cution would not depend on whether the employee was in fact injured. If the employee is "injured during the course of the initiation," the initiator would be guilty of "first degree hazing." If the employee is not injured during the course of the initiation, then only a "violation" is committed. Even though the face of the New York anti-hazing statute seems to include "physical harm or substantial risk of physical injury," it does not mention mental injuries. In New York, therefore, one who inflicts mental injury another during the course of an initiation into any organization has not committed hazing in either the first or second degree.

Although the statute's language is broad enough to cover the non-collegiate, non-fraternity hazing event, the ghost of *Lenti II* continues to haunt those who desire certainty in hazing prosecutions.[142] When removed from the collegiate and fraternity environment, it becomes unclear whether the application of the anti-hazing statute is available due to the use of the word "initiation." Arguably, it becomes equally difficult to ascertain the legislative intent in connection with student hazing because the New York statute contains no specific reference to hazing of students, by students, during the course of initiations into a student organization or an organization affiliated with a student organization. However, the court in *Lenti II* observed, "[I]t should be immaterial [whether] the practices occur while attending an educational institution or physically off the school premises."[143]

It is this author's contention that on-the-job hazing which utilizes practices that expose new employees, or other individuals, to a substantial risk of physical *or mental harm* is no less inimical and dangerous than similar acts performed as initiation tactics in fraternities and sororities on college campuses. In fact, in the non-collegiate, non-fraternity situation, the consequence of refusal or consent may be even more devastating to a new employee.[144] Employees should not be forced to choose between

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[142] *See supra* note 136 and accompanying text.

[143] *Lenti*, 260 N.Y.S.2d at 289.

[144] *See Smiling Through the Haze*, *supra* note 131, at 33.

"Once a worker decides that [he or] she is . . . being hazed, running to the boss is the worst possible response. . . . The person who doesn't laugh along may delay acceptance by her peers indefinitely and subject [himself or] herself

their physical and mental well-being and acceptance into or on their jobs. Hazing is an archaic practice which is no less "sadistic, barbaric, and immoral," nor does it shock one's conscience or offend public morals any less just because it is performed on a new employee in an occupational setting, a military plebe in the armed forces, one about to be promoted in the military, a scout, or any initiate.

VII. Conclusion

Although hazing has been widely and publicly criticized and condemned, the practice remains prevalent in our society. It is not limited to fraternities and sororities, but exists in businesses, urban gangs, and the military. Twenty-eight states have no criminal provisions regulating hazing. Twenty-two states have criminal anti-hazing statutes which seek to outlaw physical hazing. Only eleven of those outlaw hazing which endangers the mental welfare of the initiate. In other states, intentional non-physical or physical forms of hazing which expose the initiate to a substantial risk of mental injury should also be outlawed. Most criminal statutes are ineffective in reaching dangerous forms of hazing occurring in entities other than in the fraternity context. Modern statutes should be amended to reach "violent" hazing in all aspects of life. A "Model Uniform Anti-Hazing Statute" would incorporate the public policy of condemning dangerous hazing practices wherever found and is proposed for adoption for all states:

> *MODEL UNIFORM ANTI-HAZING STATUTE*
>
> (1) A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he or she intentionally or recklessly engages in conduct or knowingly permits another person under said person's direction or control to engage in conduct which creates a substantial risk of serious physical or mental injury to

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to further pranks. By smiling and taking the [hazing] good-naturedly, [the employee] often writes [his or] her own ticket into the group.

Minorities and women often are [hazed] more severely . . . . In some cases, though, these groups are not hazed at all, the ultimate exclusion.

Id.

such other person or a third person, with or without the consent of said other person or third person, and thereby causes such injury.

(2) A person is guilty of hazing in the second degree when, in the course of another person's initiation into or affiliation with any organization, he or she intentionally or recklessly engages in conduct or knowingly permits another person under said person's direction or control to engage in conduct which creates a substantial risk of physical or mental injury to such other person or a third person, with or without the consent of said other person or third person.

(3) A person is guilty of hazing in the third degree when that person aids or abets a violation of Section (1) or (2).

(4) Definitions.

(a) "Aiding" or "abetting" is encouraging the occurrence or manifestation of illegal hazing practices. Aiding or abetting as used in this statute does not include pledges, initiates, or any individual upon whom the hazing practices are administered. Pledges, initiates, or any individual upon whom the hazing practices are administered are not to be deemed accomplices as a matter of law and their testimony does not require corroboration to establish a violation of this Statute. However, the violation itself must be established by other independent evidence. Neither mere membership in an organization nor mere presence at a meeting where the practice is executed shall constitute the aiding and abetting of hazing practices.

(b) "Engagement" occurs when (1) a member of any group or a person closely affiliated with said group (2) actually participates in either the planning of the hazing activity or procedure(s) or the execution of the hazing practices.

(c) "Hazing" is any act or series of acts which cause, or is likely to cause serious physical or mental injury; or to mistreat by playing stunts or practice abusive or ridiculous tricks that subject an individual to personal indignity or ridicule.

(d) A "person" means a natural person, business entity, corporation, partnership, sole proprietorship, unincorporated association of individuals, or other organization licensed or unlicensed to do business in this state.

The proposed model anti-hazing law is generally patterned after New York's anti-hazing status with several significant modifications.[145] As provided in New York, a member of any organization, whether a fraternity, business, or scout troop, is subject to criminal penalties for "hazing" which subjects another to a "substantial risk of injury."[146] Society recognizes that individuals have a right not to be injured by other individuals and that all organizations must take precautions to assure that initiation activities which place pledges, new employees, or initiates of whatever kind into whatever organization do not cause injury.[147] There should be no shelter from prosecution for any person who intentionally or recklessly injures another or knowingly permits or encourages the performance of acts which substantially increase the risk of injury to another. This provision would expand the conventional anti-hazing statute which only address hazing within the traditional fraternal unit. This inclusion would subject the activities described in *Vaughn* to criminal prosecution.[148] More specifically, the employer would also be criminally liable where the employer "knowingly permits or encourages" job-related hazing. This provision places an affirmative duty on the employer to stop and prevent job-related hazing where he has knowledge of such activity within the scope of his control. Failure to do so would constitute a crime.[149]

Unlike some state anti-hazing statutes and the by-laws of most fraternal organizations, the intent of the proposed Model Uniform Anti-Hazing Statute is not to proscribe all hazing, but only those acts which create a strong likelihood for mental or physical injury. This recognizes that initiations and admission ceremonies are not *per se* evil activities. It further supports the belief that not all hazing is inimical to societal mores. In fact,

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[145] N.Y. PENAL LAW § 120.16 (McKinney Supp. 1991).

[146] *Id.*

[147] This is comparable to the legal duty imposed on fraternities to initiate without harming the pledges in South Carolina, which was recognized in *Ballou*, 352 S.E.2d at 488, and *Easler*, 329 S.E.2d at 753.

[148] *Vaughn*, 683 F.2d at 922.

[149] Analogously, in North Carolina, it is a misdemeanor for the college to fail to expel a student known to have hazed within the purview of the North Carolina statute. N.C. GEN. STAT. § 14-35 (1986).

some hazing has some redeeming value.[150] The proposal does criminalize those activities that a reasonable man could anticipate would cause serious physical or mental injury to the individual upon whom the activities are performed.

The injury may be mental, physical, or both under the proposed Model Uniform Anti-Hazing Statute. All injuries, whether mental or physical, must be incurred "in the course of another person's initiation into or affiliation with any organization" and inflicted by a member or in concert with members of the organization in question. The language "or affiliation with any organization" addresses hazing that occurs not so much as respects being initiated "into an organization" but initiated into a position within an organization. Victims should be protected from mental abuse as well as physical abuse. Anyone who intentionally or recklessly causes a person to suffer a mental injury should be the target of criminal prosecution.

In the proposed Model Uniform Anti-Hazing Statute, the consent defense to the crime of hazing would be eliminated. This provision would eliminate the confusion that exists as to whether an individual can consent to being hazed during a ceremony of initiation into or affiliation with an organization. Most jurisdictions hold that a victim cannot consent to atrocious assaults or batteries, conduct which "shocks the court's conscience," or activity which results in serious injury.[151] Under this proposed Statute, whether consent would be a defense to "simple" hazing, as is debated respecting "simple assault," would be a moot issue. The provision totally eliminates consent as a defense to prosecution. Initiates are virtually blind to danger and are often willing to obey the whims of those administering the

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[150] In THE MEN FROM THE BOYS: RITES OF PASSAGE IN MALE AMERICA, the author opines that:

> [T]raditional rites of passage, however inane and sadistic, still hold a definite fascination and appeal, for they seem to provide straightforward solutions to complex and difficult problems. They could make us into men, and there's certainly an attraction for that. On some level we maintain a yearning for the old forms and the old values, as crude as they may be. Our humanitarian sensibilities and our primitive inclinations, apparently contradictory, somehow manage to coexist within us. We are at cross purposes with ourselves.

Raphael, *supra* note 6, at 22.

[151] *See supra* note 114.

ceremonies. Their capacity to consent is impaired and illusory. Typically, they are not told of the acts to which they will be subjected. If the initiate knew that there was a possibility that serious physical or mental injury would result from the activity in which he or she is about to embark, the initiate would most likely decline to participate.[152] Often, those performing the acts on the initiates do not know or anticipate the extent or severity of the activities to be performed on the novitiates. Therefore, in many cases, organizations are not capable of informing those hazed or those to be hazed of the potential dangers they are about to face.[153] Thus, in such instances, the initiates are not able to give informed consent. Under such circumstances, consent is neither pure nor congruent with the dangers they ultimately face. For these reasons, the consent defense to criminal hazing prosecutions should be eliminated.

The definitional provisions of the proposed Model Uniform Anti-Hazing Statute incorporate the decision of *Lenti I* and implement the suggestions made in *Lenti II*. *Lenti I* held that the lack of detail in an anti-hazing statute did not render the statute unconstitutionally vague since it would be impossible to pinpoint every activity which would constitute hazing.[154] This proposed model statute, accordingly, briefly describes "hazing," but emphasizes that all activities for the purpose of and during initiation which present a substantial risk of injury constitute hazing. This definition gives courts broad discretion to enforce legislative intent.

Lenti II made recommendations to the New York Legislature that would make the New York anti-hazing statute more likely to survive judicial review. These changes were primarily definitional expansions to clarify that (1) initiates were not to be considered as "accomplices" during hazing activities, (2) their testimonies did not need corroboration, and (3) a conviction required "other independent evidence." The first two suggestions and the rationale behind them have been retained in the pro-

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[152] One must "freely and voluntarily expose himself to . . . *known danger*[s] of which he underst[ands] and appreciate[s] the danger." *Easler*, 329 S.E.2d at 756.

[153] *See supra* note 111.

[154] *Lenti*, 253 N.Y.S.2d at 13-14.

posed statute. The "other independent evidence" requirement suggested by the *Lenti II* court was troubling. If the state relies on the testimony of those directly "participating" in the hazing ritual, most prosecutions for criminal hazing will be difficult to achieve due to the secrecy associated with the initiation rite. Those who participate in or are aware of the suspected hazing are likely to refuse to testify or cooperate in the prosecution.[155] Unlike a civil tort case where the plaintiff-initiate aggressively sues as a result of injuries sustained during the initiation process, in a criminal prosecution of some wrong committed against society,[156] an unharmed or uninjured initiate's incentive to testify against the hazers may be absent.[157] Most likely, he or she

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[155] Interestingly, North Carolina law provides:

> In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony.

N.C. GEN. STAT. § 14-38 (1986).

[156] R. RAPHAEL, *supra* note 6, at 90-91. Raphael writes:

> Fraternities, in their own inimical manner . . . offer a true initiation in its classical form, where the power of the tribe is paramount and personal growth is carefully engineered . . . .
>
> . . . . To accomplish this monumental task, the fraternity barrages and assaults their individual egos until they acquiesce. The youths are ridiculed for their personal idiosyncracies . . . . Their privacy is mercilessly denied . . . . They are humiliated at every turn. And of course they are frightfully hazed. They are deprived of sleep and incessantly harassed. They are forced to endure extremes of hot and cold. Their minds and their bodies are tossed about till they almost shatter.
>
> . . . In part, the [fraternity] initiation must remain secret because its various and sundry antics might be construed as reprehensible in the context of more public mores. Indeed, our self-conscious body politic often tries to stop these fraternal activities as soon as it learns what is really going on. The only event which does not remain secret is the day of service, a perfectly normal and acceptable offering to respectable society.

Id.

[157] "In ninety-eight percent of the reported incidents of hazing over the past decade, . . . in nearly every case peer pressure and secrecy were [involved]." Note, *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. OF LITIGATION 191, 200 (1988). "The combination of secrecy of the rites with alcohol abuse . . . can be lethal—physically or psychologically." Hechinger, *supra* note 23, at C4, col. 3. One explanation given for this secrecy and one that may be an obstacle to successful prosecution is that "[initiates] feel a higher obligation to conceal each other's disobedience of the rules against hazing." *Hazing*, 53 THE

has successfully entered into the secretive society.[158] Despite the author's reservations respecting the "other independent evidence" recommendation, it is retained as a protection against vindictive members or failed initiates.[159]

VIII. Suggested Federal Legislation

No anti-hazing state is fully surrounded on all borders by states which have anti-hazing statutes equal in scope and penalties. In fact, every anti-hazing state borders at least one state which has no anti-hazing statute. This encourages travel from anti-hazing states to non-anti-hazing states to avoid the reach of anti-hazing statutes. It also invites the transport of potential victims from states with tougher hazing penalties to states with lesser punishments in order to reduce the sting of anti-hazing statutes. In order to give force and effect to state laws, federal legislation is needed to discourage or eliminate the potential and actual interstate activity to avoid state anti-hazing statutes. A federal law should not preempt state legislation, but should fill the existing gaps in state anti-hazing laws.

The following provision is a proposed "Federal Interstate Anti-Hazing Statute" to address this concern.

FEDERAL INTERSTATE ANTI-HAZING STATUTE

Section (1). Interstate transportation to haze.

It shall be a federal crime for anyone knowingly and intentionally (a) to cross a state line, (b) with the intent of hazing any other person (c) for the purpose or as a condition of initiation or admission of said person (d) into any organization, (e) with the further intent of avoiding the reach of the hazing laws

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Independent 51, 51 (1901).

[158] "The function of hazing . . . is to provide a threat of potential failure while simultaneously insisting that the novitiate must actually succeed" and "to [thereby] provide personal validation through social recognition." Raphael, *supra* note 6, at 64 (1988). In short, it takes a brave and, perhaps, maladjusted sort to jeopardize the very mechanism by which he or she is accorded acceptance into a group. Successful initiates will not testify against those to whom they now respect.

[159] For example, " 'Hell Week' journals and photographs of possible hazing incidents were allegedly stolen from the Phi Gamma Delta house by ousted house members during a . . . burglary, then used to help implicate the fraternity in a hazing investigation. . . . The fraternity [was] closed for two years as a result." *Hell Week Diaries Lead to Closing*, Interfraternity Bull., Jan. 1, 1988 at 3.

or penalties of the state of residence, and (f) haze said other person.

(a) It shall be prima facie evidence of a violation of Section (1) if it is established that a person has intentionally or recklessly hazed another person for the purpose or as a condition of initiation or admission and (a) the act of hazing is found to have been committed in a state which does not have an anti-hazing statute or (b) if an anti-hazing statute exists, the penalties prescribed for hazing in the state of commission are less than the penalties proscribed for hazing in the state of residence and (c) that state borders the state in which the person(s) charged with a violation of Section (1) resides.

(b) (1) If it is determined that had the activity in question occurred in the state of residence of the person charged with a crime of hazing and would have constituted hazing in the state of residence and the penalties therefore would have been more stringent than in the state of occurrence, then the defendant shall be sentenced in accordance with the penalty or penalties of the state of residence.

(c) Definitions.

(1) "Hazing" is any act or series of acts which cause, or is likely to cause serious physical or mental injury; or to mistreat by playing stunts or practice abusive or ridiculous tricks that subject an individual to personal indignity or ridicule.

(2) A "person" means a natural person, business entity, corporation, partnership, sole proprietorship, unincorporated association of individuals, or other organization licensed or unlicensed to do business in one of the subject states.

(3) "State of occurrence" means the state in which alleged hazing activity has actually transpired subsequent to the defendant charged with a violation of this statute leaving his or her state of residence.

(4) "State of residence" means the state in which the defendant charged with a violation of this statute resides or is domiciled.

This statute's purpose is to create a federal criminal offense for crossing state lines to haze another. The statute is result-oriented. One must cross state lines and actually intentionally or recklessly haze another person while or for the purpose of initiating that person into an organization before the crime is committed. The statute requires a court to compare the anti-hazing

provisions of two bordering anti-hazing states to determine if there has been an executed plan to escape the reach or penalties of the resident state's anti-hazing laws, if any exist. Where the penalties for hazing in the bordering state were less than those in the resident state, the same result would be obtained if the purpose of the interstate transportation of the initiate was to avoid more stringent penalties. In the event that there are two bordering states with anti-hazing statutes containing different penalties, then, the sentencing court is instructed to impose the more stringent penalty.

The purpose of the proposed Model Uniform Anti-Hazing Statute and the proposed Federal Anti-Hazing Statute does not render the need for the two statutes mutually exclusive. Each state should be allowed to determine the appropriate penalty for criminal hazing. In this vein, the opinions of legislatures will vary as to whether dangerous hazing ought to be a felony or misdemeanor, carry heavy or lighter terms of imprisonment or fines, or what other punitive consequences should follow from a criminal conviction for hazing. So long as the possibility of interstate transportation of potential hazing victims exists, there will be a need for federal action similar to the proposed Federal Anti-Hazing Statute. The need for action will undoubtedly grow unless nationwide action is taken.

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COMMENTS

GUIDING LOBBYING CHARITIES INTO A SAFE HARBOR: FINAL SECTION 501(h) AND 4911 REGULATIONS SET LIMITS FOR TAX-EXEMPT ORGANIZATIONS

I. Introduction

Lobbying by tax exempt charitable organizations raises two competing concerns. First is the concern that the exemption will operate as a governmental subsidization of political activity for organizations heavily involved in lobbying.[1] On the other hand, lobbying limitations should not be so restrictive as to prevent an organization from being able to speak out on legislative matters directly affecting it.[2] After years of effort, the Internal Revenue Service has struck a very delicate balance between these concerns with the final regulations construing sections 501(h) and 4911 of the Internal Revenue Code. These regulations detail which activities constitute "influencing legislation" for the purpose of determining spending limits on lobbying for organizations that elect to be governed under section 501(h).

This comment will trace the development of lobbying limitations on charitable organizations, lay out the new section 501(h) and 4911 regulations, and conclude with a suggestion for more efficient and uni-

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[1] Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983); Cammarano v. United States, 358 U.S. 498, 513 (1959); Haight, *Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations*, 23 Gonzaga L. Rev. 77, 79 (1987-88).

[2] Caplan & Timbie, *Legislative Activities of Charitable Organizations*, 39 Law & Contemp. Probs. 183, 196-201 (Autumn 1975).

form enforcement of lobbying restrictions.

II. Perilous Journey: A History of Efforts to Stem Legislative Activities of Charities

A. Sailing a Capricious Sea: The "Substantial Part" Test

In recognition of the valuable public services performed by charitable organizations, Congress long ago granted these entities tax-exempt status.[3] In addition, Congress has allowed tax deductions for contributions to certain of these organizations.[4] However, Congress and the courts soon recognized the opportunity for abuse by charitable organizations that indulged excessively in the political process through lobbying.[5] To prevent governmental subsidization of political activities through tax breaks to these lobbying organizations, Congress in 1934 enacted what was later to become section 501(c)(3) of the Internal Revenue Code.[6] Section 501(c)(3) prohibits such organizations from utilizing more than a substantial part of their activities for the purpose of influencing legislation.[7] The penalty for violation of this prohibition

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[3] *See* Act of August 27, 1894, ch. 349, § 32, 28 Stat. 556; *see also* Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 444-52 (1960); Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEORGETOWN L.J. 561, 563 (1970-71), *reprinted in* 118 CONG. REC. 844 (Jan. 24, 1972); Schachner, *Religion and the Public Treasury after Taxation with Representation of Washington, Mueller, and Bob Jones*, 1984 UTAH L. REV. 275, 282-90; Walker & Rothermel, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1116 (1969-70); Note, *Whose Voice Shall Be Heard? Lobbying Limitations on Section 501(c)(3) Charitable Organizations Held Constitutional in* Regan v. Taxation with Representation, 28 ST. LOUIS U.L.J. 1017, 1018-22 (1984) (authored by Todd Brower).

[4] I.R.C. § 170(c). Congress first allowed the deduction in 1917. *See* War Revenue Act, ch. 63, § 1201(2), 40 Stat. 330 (1917); *see also* Liles v. Blum, *Development of the Federal Tax Treatment of Charities*, 39 LAW & CONTEMP. PROBS. (4) 6, 24-41 (1975) (history of charitable deduction).

[5] *See* Slee v. Commissioner, 42 F.2d 184, 185 (2d Cir. 1930); *see also* 117 CONG. REC. 8517 (1971) (statement of Senator Muskie) (denouncing massive lobbying campaign by American Labor and Industry for SST). *See generally* Garrett, *supra* note 3, at 564 (discussing Slee and rationale for restrictions on lobbying).

[6] Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 700 (1934). For some of the discussion on the measure, see 78 CONG. REC. 5861, 5959, 7831 (1934).

[7] An organization is exempt from taxation under section 501(c)(3) of the Internal Revenue Code if "no substantial part of [its] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including and publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3). The second part of the prohibition, con-

is revocation of tax-exempt status.[8]

Unfortunately, in the decades following enactment of section 501(c)(3) it became obvious that precisely what constituted a "substantial part" of an organization's activities was not susceptible of easy definition. Indeed, the IRS has never defined "substantial part,"[9] preferring rather to approach the issue on a case-by-case basis. As a result, the courts have set forth a number of approaches to the issue, often contradictory and arbitrary.

In *Seasongood v. Commissioner*,[10] the purpose of the organization, Hamilton County Good Government League (the "League"), was to educate the public on political matters and to encourage citizens to vote.[11] The IRS took issue with certain activities of the organization and its members,[12] specifically, that the organization and its members endorsed candidates and backed or opposed legislation by contacting legislative authorities.[13] The unrefuted testimony of the League's founder and longtime president was that these activities constituted less than 5 percent of the total activities of the League.[14]

Based on this testimony, the Court of Appeals for the Sixth Circuit held that the organization did not devote a "substantial part" of its activities to influencing legislation.[15] Though *Seasongood* did not

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cerning involvement in political campaigns, is an absolute ban on the organization, even if it elects coverage by section 501(h). The Code has numerous provisions to keep this kind of political activity in check. Section 4955 imposes a 10 percent tax on amounts paid by a 501(c)(3) organization in intervening or participating in any political campaign supporting or opposing a candidate for public office. And if the organization does not recover the expenditures to the fullest extent possible and set up safeguards to prevent such expenditures in the future, the expenditure is taxed 100 percent. If the Service determines the organization has flagrantly violated the prohibition on campaigning, section 6852(a) authorizes the Commissioner to assess the collect income taxes from the organization. Section 7409 allows the service to seek an injunction against further political expenditures. The ban on campaigning stirs less controversy than the limitation on lobbying, but it is not without critics. *See* Lehrfeld, *How Much "Politicking" Can a Charitable Organization Engage In*? 29 J. TAX'N 236, 238 (1968) (questioning effectiveness of prohibition on campaigning).

[8] *See* I.R.C § 504(a).

[9] HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 267 (5th Ed. 1987).

[10] 227 F.2d 907 (6th Cir. 1955).

[11] *Seasongood*, 227 F.2d at 909.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 910. The taxpayer had filed suit because the IRS had denied him and his wife charitable deductions pursuant to sections 23(o) and 101(6) of the Internal Revenue Code of 1939. These Code sections were the predecessors of sections 170(c) and 501(c)(3) of the current Internal Revenue Code.

[15] *Id.* at 912.

actually establish a 5 percent bright-line limit on such activities, it generally has been cited for that proposition.[16] Significantly, the entire focus of the case was on the activities of the League. The case involved no pecuniary expenditures.[17]

In *Christian Echoes National Ministry, Inc. v. United States*,[18] the focus was again on the organization's activities rather than on its expenditures, although the two were undoubtedly linked.[19] However, the Court of Appeals for the Tenth Circuit rejected the percentage test approach of *Seasongood* as too simplistic.[20] Instead, the court balanced "the organization's activities in relation to its objectives and circumstances."[21]

Christian Echoes' purpose was to stem the spread of Communism, socialism and political liberalism.[22] In addition to distributing numerous publications, pamphlets, broadcast reprints, and tapes, the ministry broadcast its message by radio and television and through its own educational seminars and evangelical campaigns.[23] The court recited a litany of efforts to influence legislation scattered throughout these communications.[24] The court then concluded that an "essential part" of the organization's program was the promotion of its goals through legislation.[25] The ministry's efforts to influence legislation were "not incidental, but were substantial and continuous."[26] Reversing the trial court, the appeals court held that revocation of the organization's tax-

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[16] *See* Caplan & Timbie, *supra* note 2, at 191-94 (comparing *Seasongood*'s 5 percent approach to others used by courts); *see also* Chisolm, *Exempt Organization Advocacy: Matching the Rules of the Rationales*, 63 IND. L.J. 201, 223 n.112 (1987-88) (referring to court's decision that less than 5 percent of expenditures used for lobbying activities was not "substantial"); Clark, *supra* note 3, at 450 (discussing *Seasongood*'s "protective haven"); Haight, *supra* note 1, at 84 (noting that some tax practitioners advise charities not to exceed 5 percent threshold).

[17] *Seasongood*, 227 F.2d at 909.

[18] 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

[19] *Christian Echoes*, 470 F.2d at 852. The court noted that 52 percent of the organization's expenditures went to communications, many of which were considered attempts to influence legislation. *Id.*

[20] *Id.* at 855.

[21] *Id.*

[22] *Id.* at 852.

[23] *Id.*

[24] *Id.* at 855.

[25] *Id.*

[26] *Id.* at 856. The court also rejected the ministry's claim that its political involvement was religiously motivated and that the imposition of the lobbying limitations was therefore an infringement of the ministry's free exercise rights under the first amendment. *Id.*

exempt status was justified.

In *Haswell v. United States*,[27] the exempt organization's expenditures, as an indicator of the level of its political activities, were "crucial" to the court's substantial part determination.[28] The taxpayer in *Haswell* claimed charitable deductions for contributions to the National Association of Railroad Passengers (the "NARP"),[29] an organization he formed to "encourage and promote maintenance and improvement of passenger services, operations, and facilities of American railroads."[30] As part of its program to reach these objectives, the organization hired a lobbying firm to promote its cause in Congress.[31] The taxpayer also entertained legislators and legislative staff on behalf of the organization.[32]

The IRS denied the taxpayer's deductions, claiming that a substantial part of the NARP's activities was devoted to influencing legislation.[33] The claims court, in siding with the IRS, agreed with *Christian Echoes* that a percentage test was inappropriate.[34] Nevertheless, the court relied on the relative amount of the NARP's expenditures directed toward influencing legislation in finding that the organization had exceeded the substantiality threshold.[35]

First, the court found that the expense for the lobbying firm and the taxpayer's travel and entertainment expenditures were clearly for the purpose of influencing legislation.[36] It noted that these expenses totaled 20.5 percent of the NARP's total budget one year, and 19.27 percent the next year.[37] The court then held that these percentages indicated that a substantial part of the NARP's *activities* were aimed at influencing legislation.[38]

As a result of the disparate standards used by these and other courts,[39] enforcement of the substantial part test is fraught with

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[27] 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

[28] *Haswell*, 500 F.2d at 1145.

[29] *Id.* at 1135.

[30] *Id.* at 1136 (footnote omitted).

[31] *Id.* at 1137.

[32] *Id.* at 1139.

[33] *Id.* at 1136.

[34] *Id.* at 1142.

[35] *Id.* at 1145-46.

[36] *Id.* at 1146.

[37] *Id.*

[38] *Id.* at 1146-47. *But see* Sabbath, *Tax Exempt Political Educational Organizations: Is the Exemption Being Abused?*, 41 TAX LAW. 847, 862 (1988) (criticizing *Haswell* as favoring large organizations).

[39] *See, e.g.*, Krohn v. United States, 246 F. Supp. 341, 347 (D. Colo. 1965) (court

problems. Many authorities claim that the test is too vague, leading to selective enforcement.[40] Others fear that the penalty for failing the test, revocation of tax exempt status, is too harsh[41] and that the uncertainty about the limits on political activity discourages such organizations from taking part in the discussion of important public issues.[42] Finally, Congress has called for stricter enforcement to curb blatant abuses.[43]

B. Toward Calmer Waters: Congress Responds to the Vagaries of the Substantial Part Test

In response to some of these concerns, Senator Ed Muskie led several efforts in the early 1970s to add some clarity and certainty to the acceptable limits of a 501(c)(3) organization's political activities.[44] Sen-

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considered organization's legislative activities and commentary under public-nonpublic analysis); League of Women Voters v. United States, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (held that by merely "deliberating and discussing what position, if any, should be taken on questions of public interest," organizations were "influencing legislation").

[40] *General Explanation of the Tax Reform Act of 1876 Prepared by the Staff of the Joint Committee on Taxation*, 1976 C.B. 407 [hereinafter *Joint Committee Explanation*]; *see* Garrett, *supra* note 3, at 570-81 (concerning possible abuses against universities and public interest groups); Comment, *Tax Exemptions for Educational Institutions; Discretion and Discrimination*, 128 U. PA. L. REV. 849, 849-55 (1980) (discussing controversy surrounding feminist newspaper's application for exempt status); Comment, *The Revenue Code and a Charity's Politics*, 73 YALE L.J. 661, 664 (1969-70) (tracing inconsistency and inequity efforts to control political activity of exempt organizations).

[41] *See* S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969) at 47; *see also* Chisolm, *supra* note 16, at 244-46 (demonstrating IRS's revocation power as strong disincentive to controversial groups); Haight, *supra* note 1, at 112 (calling revocation remedy too severe and advocating excise tax instead); Note, *Charitable Lobbying Restraints and Tax Exempt Organization: Old Problems, New Directions?*, 1984 UTAH L. REV. 337, 341 (authored by Gregory E. Robinson) (noting "draconian" consequences of revocation).

[42] *See* 117 CONG. REC. 8517 (1971) (statement of Senator Muskie); *see also* Fogel, *To the I.R.S., 'Tis Better to Give Than to Lobby*, 61 A.B.A. J. 960, 964 (1975) (contrasting limits on charities that lobby with tax deductions allowed for non-charities for the same type of activities); Haight, *supra* note 1, at 112 (noting that lack of clarity in lobbying restrictions discouraged charities from involvement in public debate).

[43] *The Revised Lobbying Regulations — A Difficult Balance*, 41 TAX NOTES 1425, 1427-28 (Dec. 26, 1988). For example, the National Endowment for the Preservation of Liberty, a 501(c)(3) organization, reportedly used funds from the Iran-Contra arms sales to finance the political campaigns of conservative candidates and to run lobbying advertisements against congressmen who opposed Contra aid. *Id.*; *see Iran-Contra Aid Scandal Develops Tax Twist; Pickle Meets with Gibbs to Discuss Activities of Tax-Exempt Organizations*, 33 TAX NOTES 1093, 1093 (Dec. 22, 1986) (detailing congressional reaction to perceived abuses by tax-exempt organizations); *see also*, Chisolm, *supra* note 16, at 202-04 (discussing abuses by other organizations).

[44] *See* S. 1408, 92nd Cong., 1st Sess., 117 CONG. REC. 8518 (1971); *see also* H.R.

ator Muskie's aim was to liberalize the substantial part test so that charitable organizations would not be reluctant to speak out on legislation directly affecting them.[45] The senator reasoned that it was contradictory to praise these organizations for their public service, then discourage them from participating in public debates on important issues.[46] He also realized that these activities should not be limitless.[47] These efforts on the part of Senator Muskie and others culminated in the inclusion in the 1976 Tax Reform Act of what would become sections 501(h) and 4911 of the Internal Revenue Code.[48] Briefly, these sections create a safe harbor allowing any organization described in section 501(c)(3), other than a church or church-related entity, to elect to use the liberal spending limits of section 501(h). In contrast to violation of the substantial part test of 501(c)(3), which results in loss of tax-exempt status, violation of the section 501(h) limits on lobbying and grassroots lobbying expenditures triggers the imposition of an excise tax on the excess spending.[49] The electing organization loses its tax-exempt status only if it regularly exceeds its spending ceilings over a four-year period.

The broad language of sections 501(h) and 4911 had its share of ambiguity, too, primarily on the issue of what constituted "influencing legislation."[50] Few organizations made the election for fear of inadvertently exceeding the spending limits.[51] To clear up these apprehen-

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12037, 93d Cong., 1st Sess. (1973); S. 1036, 93d Cong., 1st Sess., 119 CONG. REC. 5747 (1973); H.R. 13720, 92d Cong., 2d Sess. (1972); s. 3063, 92d Cong., 2d Sess., 118 CONG. REC. 844 (1972); H.R. 8176, 8920, 92d Cong., 1st Sess. (1971). Senator Muskie's original bill, S. 1408, was modeled on a resolution of the American Bar Association. *See* 117 CONG. REC. 8518 (1971); *see also* Geske, *Direct Lobbying Activities of Public Charities*, 26 TAX LAW. 305, 310-21 (1972-73) (outlining details of early bills).

[45] 118 CONG. REC. 843, 843 (1972) (statement of Senator Muskie).

[46] 117 CONG. REC. at 8517 (statement of Senator Muskie).

[47] *Id.*

[48] Pub. L. No. 94-455, §§ 1307(a), (b), 90 Stat. 1720-21, 1723-26 (1976).

[49] Another significant difference between the section 501(c)(3) substantial part test and the section 501(h) and 4911 safe harbor provisions is that under the latter provisions activities not involving expenditures, such as the work of unpaid volunteers, are not taken into account at all. *See* Treas. Reg. § 1.501(h)-3(e), example (5); *see also* Cummings, *Revised Proposed Regulations on Lobbying by Electing Public Charities and by Private Foundations*, 67 TAXES 193, 196 (1989) (electing charities need not worry about activities so long as expenditures are within safe harbor limits).

[50] Troyer & Slocombe, *New Prop. Regs. on Lobbying Ease Many Restrictions*, 70 J. TAX. 146, 146 (1989) (asserting that lack of regulations inhibited election by charities).

[51] *Revised "Grass Roots Lobbying" Regulations*, 42 TAX NOTES 149, 150 (January 9, 1989). As of early 1989, only one percent of more than 300,000 eligible organizations had elected to be governed by section 501(h). *Id.*

sions, the IRS proposed regulations under sections 501(h) and 4911 clarifying what sort of activities or expenses were caught in the lobbying net.[52] The first set of proposed regulations, released in 1986, drew thousands of comments, many of them critical of the proposals.[53] In response, the IRS revised the proposed regulations to address the shortcomings of the first effort.[54] As revised, the final rules have apparently placated most critics.[55]

III. Safe Harbor: The Final Regulations

As noted above, any 501(c)(3) organization, except churches and church-related organizations,[56] may elect to be governed by section

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[52] *See* 51 Fed. Reg. 46211 (Nov. 5, 1986).

[53] *The Revised Lobbying Regulations — A Difficult Balance*, 41 Tax Notes 1425, 1427 (Dec. 26, 1988); *see* Chisolm, *supra* note 16, at 202, nn.5, 6, 7 (citing opposition to proposed regulations by exempt organizations, lawyers, and members of Congress).

[54] *See* 53 Fed. Reg. 51826 (Dec. 23, 1988).

[55] The 1988 revisions elicited about one hundred written comments, compared to more than 10,000 comments on the 1986 proposals. 55 Fed. Reg. 35580 (August 31, 1990). The final regulations, adopted August 30, 1990, vary little from the 1988 revised proposals. *Id.* at 35581. Most of the concerns raised in the comments to the 1988 revisions are handled in additional examples contained in the final regulations. *Id.*

[56] Congress inserted this exclusion from election eligibility at the request of church groups. *Joint Committee Explanation*, *supra* note 40, at 427. The primary concern was that because many religions "define their religious missions as including [an] obligation to speak out on and attempt to influence public affairs," then any attempt by the government to restrict lobbying communications of churches, whether under section 501(c)(3) or section 501(h), was an unconstitutional infringement of the first amendment's free exercise clause. *Hearing Before the Committee on Ways and Means, House of Representatives, on H.R. 13500*, 94th Cong., 2d Sess. 64 (1976) [hereinafter *Hearing*] (statement of James E. Wood, Jr., executive director of the Baptist Joint Committee on Public Affairs). This concern was especially acute in light of the Tenth Circuit's decision in Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). In that case, the court held that the government could restrict lobbying by churches through taxation even if the lobbying is religiously motivated. *Id.* at 856-57. Rather than appear to acquiesce to such restrictions, these groups requested exclusion from 501(h) and neither supported nor opposed the legislation. *See Hearing*, *supra*, at 64 (statement of James E. Wood, Jr., executive director of the Baptist Joint Committee on Public Affairs); *Hearing*, *supra*, at 75 (statement of Lutheran Council in the U.S.A. on behalf of American Lutheran Church and Lutheran Church of America); *Hearing*, *supra*, at 78 (statement on behalf of National Council of the Churches of Christ in the U.S.A.); *Hearing*, *supra*, at 90 (statement on behalf of United States Catholic Conference). Congress also responded to the reactions of these groups by allowing a church or church-related organization disqualified under section 501(c)(3) to convert to a section 501(c)(4) social welfare organization (thereby retaining tax-exempt status), *see* I.R.C. § 504(c), by officially stating that it neither supported nor opposed the holding in *Christian Echoes*, *see Joint Committee Explanation*, *supra* note

501(h).[57] Any non-electing organization will continue to be judged under the 501(c)(3) substantial part test.[58] Both electing and non-electing organizations must continue to follow the reporting rules of section 6033, though electing organizations must provide a more detailed accounting.[59]

Section 501(h) establishes upper limits on the amount of money an electing organization may spend on efforts to influence legislation. This limit, the "lobbying non-taxable amount," is calculated on a sliding percentage of the total exempt purpose expenditures of the organization.[60] Exempt purpose expenditures are made up of normal administrative expenses to influence legislation.

"Influencing legislation" includes direct lobbying and grass roots lobbying. The lobbying non-taxable amount is 20 percent of the first $500,000 of exempt purpose expenditures, 15 percent of the next $500,000, 10 percent of the next $500,000, and 5 percent of any amount over $1.5 million.[61] The maximum lobbying non-taxable amount for any organization is $1 million per year.[62] The grass roots non-taxable amount is 25 percent of the lobbying limit.[63]

The statute and regulations also contain provisions for including affiliated organizations in the above calculations to prevent abuse through creative accounting.[64] If an organization exceeds either of these limits in a given tax year, section 4911(a)(l) imposes a 25 percent excise tax[65] on the lobbying or grass roots excess, whichever is greater.[66] If an organization normally exceeds either limit, its exempt status is revoked.[67] Under the regulations, an organization regularly exceeds its expenditure limits if it spends an average of more than 150

40, at 427-28, and by expressly providing that ineligible or nonelecting organizations would not be judged by the section 501(h) and section 4911 standards. *See* I.R.C. § 501(h)(7).

[57] I.R.C. § 501(h)(3); Prop. Treas. Reg. § 1.501(h)(2).

[58] I.R.C. § 501(h)(7).

[59] *See infra*, note 103 and accompanying text.

[60] *Cf.* Haswell v. United States, 500 F.2d 1133, 1145-46 (Ct. Cl. 1974) (comparing relative amount of organization's lobbying activities to its overall activities), *cert. denied*, 419 U.S. 1107 (1975). *But cf.* Sabbath, *supra* note 39, at 862 (criticizing analysis of *Haswell* as favoring large organizations).

[61] I.R.C. § 4911(c)(2).

[62] *Id.*

[63] I.R.C. § 4911(c)(4).

[64] *See* I.R.C. § 4911(f); Treas. Reg. § 56.4911-7.

[65] I.R.C. § 4911(a)(1).

[66] I.R.C. § 4911(b).

[67] I.R.C. § 501(h)(1).

percent of either its lobbying or grass roots limit over a four year period.[68]

Lobbying expenditures are defined as those used to influence legislation.[69] Section 4911(d) defines "influencing legislation" as any attempt to mold the opinions of any segment of the general public (grass roots lobbying) or to affect legislation by contacting legislators, legislative employees, or any government employee involved in formulating legislation (direct lobbying).[70] However, the definition makes exceptions for (1) nonpartisan analysis, study, or research,[71] (2) examinations of broad social, economic, and similar problems,[72] (3) giving technical advice or assistance to a governmental body or committee at the written request of that body,[73] (4) appearances before or other contact with a legislative body with respect to matters directly affecting the electing organization (so-called "self-defense communications"),[74] (5) contact with bona fide members of the organization concerning legislation affecting the organization,[75] (6) any contact with a legislative member or employee that is unrelated to affecting legislation.[76]

Grass roots lobbying is any attempt to influence any segment of the general public, subject to the above exceptions.[77] Put in simple mathematical terms, grass roots lobbying is a subset of lobbying. More specifically, the regulations set forth a three-part test for determining what qualifies as grass roots lobbying.[78] A communication is grass roots

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[68] Treas. Reg. § 1.501(h)(3).

[69] I.R.C. § 501(h)(2)(A).

[70] I.R.C. § 4911(d). "Direct lobbying" is defined as any attempt to influence legislation by communicating with a legislator or anyone else involved in formulating legislation. Treas. Reg. § 56.4911-2(b)(1). This communication must refer to specific legislation and reflect a view on that legislation. Treas. Reg. § 56.4911-2(b)(1)(ii). The final regulations contain a special rule concerning communications relating to referenda, ballot initiatives, and similar procedures. Treas. Reg. § 56.4911-2(b)(1)(iii). In such a case, the general public in the area where the vote will take place will be considered "legislators." *Id.* Thus, any communication to the general public that refers to and reflects a view on the "legislation" would be direct lobbying.

[71] I.R.C. § 4911(d)(2)(A); Treas. Reg. § 56.4911-2(c)(1).

[72] Treas. Reg. § 56.4911-2(c)(2).

[73] I.R.C. § 4911(d)(2)(B); Treas. Reg. § 56.4911-2(c)(3).

[74] I.R.C. § 4911(d)(2)(C); Treas. Reg. § 56.4911-2(c)(4).

[75] I.R.C. § 4911(d)(2)(D). The Service has stated that "bona fide member" does not include "persons simply included on a mailing list or those whose financial support of the organization is in the distant past." 53 FED. REG. at 51830.

[76] I.R.C. § 4911(d)(2)(E).

[77] I.R.C. § 4911(c)(3), (d)(1)(A).

[78] Treas. Reg. § 56.4911-2(b)(2).

lobbying if it (1) refers to specific legislation,[79] (2) reflects a view on the legislation,[80] and (3) encourages the recipient to take action with respect to the legislation.[81] The third element, the "call to action," includes urging the recipient to contact directly a legislator concerning the legislation,[82] stating the legislator's address or phone number,[83] providing a petition or tear-off postcard for the recipient to send to the legislator,[84] or identifying legislators whose leanings are undecided or opposed to the organization's view.[85]

The regulations specifically address certain mass media advertisements that are included in grass roots lobbying.[86] Normally, any communications made through mass media will be judged by the three-part test.[87] However, if within two weeks of a vote by a legislative body or committee on a piece of highly publicized legislation, an electing organization through the mass media advertising expresses an opinion on the general subject of the legislation and either refers specifically to the legislation or urges recipients to contact legislators concerning the subject of the legislation, then the communication is presumed to be grass roots lobbying.[88] The organization may rebut this presumption by showing that it customarily makes such communications regardless of the timing of legislative activity or that the timing of the communication is otherwise unrelated to the legislative activity.[89] Of course, the communication is a grass roots communication despite these showings

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[79] Treas. Reg. § 56.4911-2(b)(2) (ii)(A).

[80] Treas. Reg. § 56.4911-2(b)(2)(ii)(B).

[81] Treas. Reg. § 56.4911-2(b)(2)(ii)(C). The definition of "grass roots lobbying" drew some of the most heated criticism of the regulations as originally proposed. The comments attacked the original proposals as overbroad since they did not require a call to action, would include as grass roots lobbying balanced discussions of a piece of legislation based on whom the discussions reached, and did not require the legislation to be pending. 53 FED. REG. at 51828; *see* Troyer & Slocombe, *supra* note 50, at 146-53. The final regulations also contemplate the use of communications that initially would not qualify as grass roots lobbying but that are later used in conjunction with a call to action. *See* Treas. Reg. § 56.4911-2(b)(2)(v).

[82] Treas. Reg. § 56.4911-2(b)(2)(iii)(A).

[83] Treas. Reg. § 56.4911-2(b)(2)(iii)(B).

[84] Treas. Reg. § 56.4911-2(b)(2)(iii)(C).

[85] Treas. Reg. § 56.4911-2(b)(2)(iii)(D).

[86] Treas. Reg. § 56.4911-2(b)(5).

[87] Treas. Reg. § 56.4911-2(b)(5)(i).

[88] Treas. Reg. § 56.4911-2(b)(5)(ii). The presumption does not apply to large-scale direct mailings. 55 FED. REG. 35582. The IRS has promised to watch for abuses in this area, though. *Id.*

[89] *Id.*

if it is covered by the three-part test.[90]

Finally, the regulations allocate expenditures for communications that are part lobbying and part non-lobbying or that are part lobbying and part grass roots lobbying.[91] The costs of a communication to nonmembers that also has a bona fide nonlobbying purpose may be divided between the lobbying and nonlobbying parts of the communication.[92] Any part of the communication discussing the same specific subject of the lobbying portion is included in the lobbying amount.[93] In communications sent primarily to members, the organization may make a similar allocation.[94] However, the regulations expressly reject a method of allocation based on the specific number of sentences encouraging the member to take action.[95]

As to a communication that is made up of direct lobbying and grass roots lobbying elements, the entire communication is presumed to be a grass roots communication unless the organization can prove the communication was primarily direct lobbying.[96] In that case, the organization can make a reasonable allocation between the two.[97]

IV. Conclusion

Sections 501(h) and 4911 have been part of the Internal Revenue Code since 1976, but have accomplished little other than stirring up added controversy. The process of putting flesh on the statutory skeleton has been arduous, but the proposed regulations should add vitality to these provisions. The result, tying the substantial part test to an organization's expenditures, is not without its weaknesses. The statutes and regulations do not take into account absolute figures, thereby favoring large organizations with considerable resources.[98] Neither do they give adequate weight to such factors as the strength of an organization's opinion or the volunteer efforts of unpaid organization members.[99] Nevertheless, charitable organizations are unlikely to complain, especially given the very liberal expenditure limits of the statutes and

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[90] *Id.*

[91] Treas. Reg. § 56.4911-3.

[92] Treas. Reg. § 56.4911-3(a)(2)(i).

[93] *Id.*

[94] Treas. Reg. § 56.4911-3(a)(2)(ii).

[95] *Id.*

[96] Treas. Reg. § 56.4911-3(a)(3).

[97] *Id.*

[98] *See supra* note 60.

[99] *See supra* note 49.

regulations.[100] More importantly, there is clarity, at least as much as the Code and the Service can reasonably offer, in an area formerly plagued by vague standards.

With the bugs worked out of the originally proposed regulations, eligible organizations may be expected to make the election in increasing numbers because of the certainty and liberality of the new rules.

The question, now, is why would an organization not make the election? Or perhaps a better question would be, why not eliminate the election and make the 501(h) and 4911 standards mandatory?[101] Assuming that the rules under sections 501(h) and 4911 are more desirable than the vagaries of the current 501(c)(3) substantial part test, a reasonable assumption since objections to the proposed regulations as revised were minimal,[102] the only burden is the accounting. Section 6033 and its accompanying regulations require the filing of Form 990 for most tax-exempt organizations.[103] Electing organizations must complete part VI of Form 990 Schedule A, which will require the organization to wind its way through the section 501(h) and 4911 regulations. While this requirement will initially entail some time and expense on the part of the organization, there should be little difficulty in filing the required schedule once the procedures are in place. This is an insignificant burden since part III of schedule A requires a "detailed description of the legislative activities and a classified schedule of the expenses paid or incurred" from nonelecting organizations anyway.

In sum, imposing the 501(h) and 4911 standards on all eligible organizations[104] will give due regard to both concerns raised in the intro-

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[100] Indeed, it is unlikely that anyone else will be in a position to object in light of the Second Circuit's decision in United States Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1946 (1990), in which the court held that a charitable organization did not have standing to object to IRS's alleged inadequate enforcement of lobbying restrictions on the Catholic church. *Cf.* Allen v. Wright, 468 U.S. 737 (1984) (finding that parents of black public schoolchildren had no standing to attack IRS's alleged lack of enforcement of anti-discrimination statutes and regulations).

[101] This is not a novel idea. *See Revised "Grass Roots Lobbying" Regulations*, 42 TAX NOTES 149, 150 (Jan. 9, 1989) (suggestion of Mark Weinberg). The change from current law would require supporting legislation. *Id.*

[102] Also, after the furor from charities over the regulations as originally proposed, congressional pressure led to closer cooperation between the IRS and charities. *See Sweet Charity and the Lobbying Taint*, 34 TAX NOTES 848 (March 2, 1987). The result: The IRS backed down on almost every major area of contention. *See* 53 FED. REG. 51826.

[103] I.R.C. § 6033; Treas. Reg. § 1.6033-2. Section 6033(a)(2) exempts churches and organizations with gross receipts of less than $5,000 per year from the reporting requirement.

[104] Naturally, churches and church-related organizations would continue to be ex-

duction to this comment. These standards will provide an ascertainable measuring stick that gives charitable organizations much-needed flexibility, and the burden of enforcement on the IRS should become considerably lighter.

Kim Bouchillon

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cluded from this "mandatory election," at least until such time as their constitutional concerns are resolved.

UNINSURED MOTORIST INSURANCE, THE COMMERCIAL FLEET POLICY, AND *HARRIS v. MAGEE*: A MODEST PROPOSAL FOR CHANGE

I. Introduction

When the Mississippi State Legislature enacted the Mississippi Uninsured Motorist Act,[1] it followed virtually all other states in creating a comprehensive set of statutes to help protect citizens from uninsured or underinsured motorists.[2] Section 83-11-101(1) of the Mississippi Code mandates that all automobile liability insurance policies issued or delivered after January 1, 1967 shall contain, "an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle. . . ."[3] The legislative intent behind the Act was to protect insured motorists and their passengers from the negligence of uninsured drivers.[4]

Uninsured motorist insurance conceptually operates to fill the void left by ineffective motor vehicle financial responsibility laws as well as their ineffective enforcement, and "is intended, within the limits of its coverage, to afford financial recompense to those injured solely through the negligence of motorists who, because they are uninsured or financially irresponsible, cannot satisfy adverse judgments."[5]

One of the fundamental notions in the jurisprudence surrounding the Mississippi Uninsured Motorist Act is that, in order to serve its underlying policies, the act must be liberally construed in favor of the

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[1] The Mississippi Uninsured Motorist Act has been codified at Miss. Code Ann. § 83-11-101 through 83-11-111 (1972 & Supp. 1990).

[2] *See generally* R. Long, The Law of Liability Insurance, 24-205 app. A (1979) (detailed comparisons of individual state uninsured motorist statutes).

[3] Miss. Code Ann. § 83-11-101(1) (Supp. 1990).

[4] Rampy v. State Farm Mut. Auto Ins. Co., 278 So. 2d 428, 432 (Miss. 1973). The Mississippi Uninsured Motorist Act has at its heart the legislative policy of protecting the public-at-large and assuring that citizens of Mississippi who are injured on the highways will be provided insurance coverage. Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 Miss. L.J. 255, 260 (1982) (citing Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975)).

[5] Phillips, *supra* note 4, at 256 (overriding purpose of uninsured motorist insurance is to protect innocent insured motorists from financially irresponsible drivers).

injured party.[6]

Because of the broad interpretation given to the Act by the Mississippi Supreme Court, as well as the general rule that ambiguous provisions in an insurance policy are to be construed in favor of the insured,[7] the courts allow "stacking" of uninsured and underinsured motorist coverage of multiple vehicles covered by a single policy or of multiple policies covering a single insured.[8] However, to allow stacking under a commercial fleet policy leads to a commercially unreasonable result, creates a windfall to a permissive user or occupant of the commercial vehicle, and defeats the reasonable contractual expectations of the parties to the insurance contract.

This comment will examine the stacking issue, as it pertains to the aggregation of the amount of available coverage as applied to "commercial fleets" of vehicles as announced in the recent Mississippi case of *Harris v. Magee*,[9] and will attempt to show the public interest is not served by allowing stacking in the commercial realm. Furthermore, this comment will attempt to offer solutions to the problems created by aggregation of coverage under a commercial policy by a second class insured.

A. Classification of Insureds

To recover under an uninsured motor vehicle endorsement contained within an automobile liability insurance policy, a claimant must prove the following basic requirements:

1) That the claimant was within the definition of "insured" under the particular policy and/or for the Mississippi Uninsured Motorist Act at the time of the accident;

2) That the alleged tortfeasor was within the definition of "unin-

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[6] *See* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 437 (N.D. Miss.), *aff'd*, 539 F.2d 574 (5th Cir. 1976) (Act is to be liberally construed to maximize humanitarian purpose); Washington v. Georgia American Ins. Co., 540 So. 2d 22, 25 (Miss. 1989) (Mississippi uninsured motorist statute is to be liberally construed to provide coverage); *see also Parker*, 314 So. 2d at 344 (nature of Mississippi uninsured motorist statute mandates broad, liberal interpretation).

[7] Stevens v. United States Fid. & Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977). *Stevens* notes that a policy interpretation of ambiguous language will be construed to provide the most coverage. *Id.*; *see also* State Farm Mut. Auto Ins. Co. v. Taylor, 233 So. 2d 805, 810 (Miss. 1970) (same); Hodges v. Canal Ins. Co., 233 So. 2d 630, 634 (Miss. 1969) (same). *See generally* KEETON & WIDISS, INSURANCE LAW, § 6.03(a)(2) (Practitioners ed. 1988) (ambiguities in policy resolved against insurers as general rule).

[8] Phillips, *supra* note 4, at 261 (ambiguous insurance policy provisions are generally construed against insurance companies in uninsured motorist cases).

[9] Harris v. Magee, 573 So. 2d 646, 655 (Miss. 1990).

sured motorist" under the particular policy and/or the Mississippi Uninsured Motorist Act at the time of the accident;

3) That the alleged tortfeasor was "legally liable";[10] and

4) That the "insured" sustained damages proximately caused by the "uninsured motor vehicle", as well as the nature of such damages and their extent.[11]

The pertinent provision of the Act dealing with coverage under an uninsured motorist policy is section 83-11-103(b) of the Mississippi Code, which provides:

> The term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above. The definition of the term "insured" given in this section shall apply only to the uninsured motorist portion of the policy.[12]

The Mississippi Supreme Court has specifically construed this statutory language to create two separate classes of insureds each having a different extent of coverage.

Class one includes the named insured, and the named insured's spouse and relatives while they are residing in the same household. Class one insureds are covered under the Act whether or not they are in the insured vehicle, some other vehicle, or no vehicle at all.[13] Class two includes any person who uses the insured vehicle with the express or implied consent of the named insured, including any passenger in such circumstances. Class two insureds are covered only while occupying the insured vehicle or using it.[14]

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[10] State Farm Fire & Casualty Co. v. Wightwick, 320 So. 2d 373, 375 (Miss. 1975); *see also* Miss. Code Ann. § 83-11-103 (Supp. 1990) (statute defining terms as used in uninsured motorist law in Mississippi).

[11] Coleman v. Samford, 521 So. 2d 876, 877 (Miss. 1988); *see also* Roberts v. Grisham, 487 So. 2d 836, 839 (Miss. 1986) (same).

[12] Miss. Code Ann. § 83-11-103(b) (Supp. 1990).

[13] *See, e.g.*, Lowery v. State Farm Mut. Auto Ins. Co., 285 So. 2d 767, 771 (Miss. 1974) (definition of class one insured under Mississippi Uninsured Motorist Act).

[14] *See, e.g.*, Aetna Casualty & Sur. Co. v. Barker, 451 So. 2d 731, 732-33 (Miss. 1984) (definition of class two insured under Mississippi Uninsured Motorist Act); Stevens v. U.S.F. & G., 345 So. 2d 1041, 1043 (Miss. 1977) (same).

B. Stacking

The term "stacking" relates to the amount of coverage available to an insured under an applicable uninsured motorist policy. Once it is determined that an injured party falls within one of the Act's protected classes (i.e., a finding that there is an "insured"), it becomes important to determine in dollars and cents how much indemnification is available for the injured party.[15] Stacking "allows an insured to recover damages up to the limits of coverage under each policy that includes him in its uninsured motorist coverage or to the limits for each vehicle for which a premium was paid."[16]

Due to the broad definitions in the Act itself an insured may very well be covered by uninsured motorist provisions of more than one policy, and families with multiple vehicles often have uninsured motorist coverage on more than one vehicle.[17] By "stacking" the available dollar amounts of coverage, an injured party can aggregate all the various amounts of coverage available to him up to a maximum of the full amount of his damages or the limits of the combined coverage.[18]

There has been much litigation in Mississippi and elsewhere surrounding stacking and the class two or "permissive user" insured.[19] There has also been substantial litigation surrounding whether a class two insured may stack multi-vehicle coverage in a commercial fleet policy.[20]

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[15] Phillips, *supra* note 4, at 284. "This method of aggregating the coverages of different policies applicable to an injured party is popularly referred to as 'stacking,' and this principle is the source of much litigation." Wickline v. United States Fidelity & Guar. Co., 530 So. 2d 708, 711 (Miss. 1988).

[16] Phillips, *supra* note 4, at 284-85. An injured party may often be covered by uninsured motorist provisions of more than one automobile liability policy, due to broad definitions of "insured" under the Mississippi Uninsured Motorist Act. *Id.*

[17] *Id.*; *see Lowrey*, 285 So. 2d at 771 (class one insured may be covered under policies on multiple vehicles).

[18] Phillips, *supra* note 4, at 285; *see* Harthcock v. State Farm Mut. Auto Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (seminal stacking case in which insured allowed to stack available coverage up to entire amount of damages for which insured could recover).

[19] *Wickline*, 530 So. 2d 708, 711 (Miss. 1988) (reiterating that uninsured motorist insurance is designed to provide innocent insured motorists compensation for injuries caused by uninsured motorist).

[20] *See generally* Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Fleet Policy*, 25 A.L.R. 4th 896 (1989) (lists cases involving multi-vehicle coverage in commercial fleet setting).

II. Class Two Stacking in Mississippi

A. *Pre*-Harris-*Developments*

In Mississippi the law allows a class two insured to stack the coverages available to him in certain situations.[21] Some have stringently argued, and other courts have held, that class two insureds should not be allowed to stack coverage, because unlike class one insureds, the second class insureds do not have any contractual relationship with the insurer and have not paid premiums for any additional coverage.[22] Consequently a class two insured should have no "reasonable expectancy of increased coverage by stacking."[23] Mississippi courts however, conclude the issue is not whether the insured has paid a premium but simply whether the insured purchased protection.[24]

In *Wickline v. United States Fidelity & Guaranty Co.*,[25] the Mississippi Supreme Court definitively settled the issue of second class insured stacking in personal automobile vehicles.[26] In *Wickline*, the dece-

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[21] *See, e.g.*, Curry v. Travelers Indem. Co., 728 F. Supp. 1299, 1304 (N.D. Miss. 1989) (class two insured allowed to stack benefits under employer's single business policy); Brown v. Maryland Casualty Co., 521 So. 2d 854, 856-57 (Miss. 1987) (class two insured allowed to stack coverage on both vehicles of personal policy issued to owner of vehicle she was driving).

[22] *Curry*, 728 F. Supp. at 1301. The defendant urged the Mississippi Supreme Court to follow a long list of alternate state precedent which denied stacking to second class insureds. *Id.*

[23] *Id.* at 1301; *see also* Hines v. Home Ins. Co., 495 So. 2d 682, 683 (Ala. Civ. App. 1986) (second class insured not party to contract therefore no reasonable expectation of coverage); Travelers Ins. Co. v. Pac, 337 So. 2d 397, 399 (Fla. App. 1976), *cert. denied*, 351 So. 2d 407 (Fla. 1977) (allowing class two insured to stack incurs millions of dollars of potential liability for insurer for only minimal premium).

[24] Brown v. Maryland Casualty Co., 521 So. 2d 854, 856 (Miss. 1987). In *Brown* the Mississippi Supreme Court adopted the Montana Supreme Court's reasoning which concluded:

> [Plaintiff] was an insured as defined by the policy. Under these facts there is no reason to distinguish between persons insured and policyholders who have actually paid premiums. The justification for stacking lies not in who has paid for the extra protection, but rather that the protection has been purchased. The benefits flow to all persons insured.

Brown, 521 So. 2d at 856-57 (quoting Sayers v. Safeco Ins. Co., 192 Mont. 336, 628 P.2d 659, 662 (1981)).

[25] 530 So. 2d 708 (Miss. 1988).

[26] *Wickline*, 530 So. 2d at 714. "Stacking is firmly imbedded in our uninsured motorist law." *Id.* The court reiterated the mandatory stacking of coverage for an individual policy. *Id.* (citing Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977)); *see also* St. Arnaud v. Allstate Ins. Co., 601 F. Supp. 192, 194 (S.D. Miss. 1980) (same).

dent sustained fatal injuries after an automobile accident where the vehicle in which she was riding struck a parked car.[27] The car in which Wickline was riding was owned by Mills Carter, Jr., an insured who owned three other vehicles, all of which were insured by U.S.F. & G. for $10,000/20,000 per person/per accident on the vehicles and uninsured motorist coverage of $10,000 per person and $20,000 per accident.[28]

U.S.F. &. G. paid $10,000 to the wrongful death beneficiaries as the limits of its bodily injury liability but made no uninsured motorist payment.[29] The beneficiaries filed suit asserting that since Wickline had $20,000 uninsured motorist coverage available to her from State Farm and the limit on Carter's policy was $10,000, Carter was an "underinsured motorist" under the statute.[30] The plaintiffs contended they were entitled to the $10,000 per person uninsured motorist limit on each of the four Carter vehicles, amounting to $80,000 of uninsured motorist payments.[31] The trial court held the survivors could not "stack" the coverage for all four of the Carter vehicles, and both parties appealed.[32] On appeal, the uninsured motorist carrier argued that a guest passenger could not stack his class one coverage from his own carrier with class two coverage provided by the host driver's insurer to create an "underinsured"[33] vehicle under the host's uninsured motorist

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[27] *Wickline*, 530 So. 2d at 710. Wickline was a passenger in a car driven by Mills Carter III. *Id.* Neither Wickline nor any of the appellants were family members of the driver or owner of the car. *Id.* The accident resulted from the sole negligence of Mills Carter III. *Id.*

[28] *Id.* Wickline was a first class insured on the two insurance policies issued to her family by State Farm Insurance Company. *Id.* The limits were the same as Carter's at $10,000/20,000. *Id.*

[29] *Id.* at 710-11. U.S.F. & G. admitted liability of $10,000 or the limit of the per person liability coverage on the vehicle involved in the accident. *Id.* U.S.F. & G. argued that first class coverage on Carter's policies were not available to the Wicklines since Wickline was prohibited from stacking coverage in a single car accident. *Id.* at 711.

[30] *Id.* The Wicklines asserted that the vehicle in which the accident occurred was uninsured since the liability coverage on the car was less than the first class uninsured motorist coverage available to Wickline. *Id.* Thus, the Wicklines alleged it was error for the trial court to deny stacking of Carter's remaining first class uninsured motorist coverage. *Id.*

[31] *Id.* Wickline alleged that the deceased and each of the living plaintiffs were entitled to the maximum coverage available of $80,000. *Id.*

[32] *Id.* The Plaintiffs appealed the denial of stacking, and U.S.F. & G. appealed the denial of its cross-motion for summary judgment based on the principle that Wickline could not stack her class one uninsured motorist coverage with class two coverage from another carrier to come within the terms of the statute. *Id.*

[33] *Id.* The court noted that on January 1, 1980, the Mississippi Uninsured Motorist Act was amended to include underinsured motorist coverage, adding to the already pre-

coverage.[34] The Mississippi Supreme Court found Wickline's class one coverage and the class two coverage on the vehicle in which Wickline was a passenger could be stacked to meet the statutory definition of an uninsured motor vehicle.[35]

The court next examined whether the Wicklines were entitled to stack the coverage of the additional Carter vehicles.[36] In its analysis, the court distinguished between class one and class two insureds, stating that its prior decisions looked too much to the law of other states, and not enough to the terms of the Mississippi Uninsured Motorist Act.[37]

The Mississippi Supreme Court found that in Mississippi, the question in uninsured motorist cases became "purely and simply one of reading the statute as written," and the court reiterated that, the "judicial eye reads only the positive command of the statute."[38] After noting that stacking has become a "positive gloss" on the Mississippi Uninsured Motorist Act the court addressed the "multiple premiums" argument;

> No one would question stacking were Mills Carter, Jr., the named insured, the plaintiff. A combined reading of *Brown*, *Pearthree* and *Bridges* establishes as much. Are Stacey Wickline's personal representatives insureds of any less status than

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sent uninsured motorist coverage. *Id.*; *see* MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1990), which states that, "uninsured motor vehicle" shall mean: "An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage." MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1990).

[34] *Wickline*, 530 So. 2d 708, 711 (Miss. 1988). The trial court permitted the survivors of the deceased to stack the uninsured motorist coverage on the Carter vehicle with the first class insurance. *Id.* However, the trial court denied the stacking of the remaining Carter vehicles. *Id.*

[35] *Id.* at 713. The court found that if an injured person is insured under more than one uninsured motorist policy the limits of each policy were applicable to the insured and could be stacked to create coverage. *Id.*

[36] *Id.* at 714. The trial court had carefully classified Wickline in accord with the insurance definitions previously established. *Id.* Because Wickline had no statutory connection with Carter's remaining vehicles, and was only a class two insured, the trial court denied stacking of all uninsured motorist coverage. *Id.*

[37] *Id.* The court was concerned by previous decisions' reliance upon jurisdictions other than Mississippi. *Id.* The court determined to consider legislative intent only. *Id.*

[38] *Id.* A specific reading of the Uninsured Motorist Act was necessary since there was no "natural law" definition of insured in uninsured motorist law. *Id.* The court was concerned only with legislative intent and reiterated that it was not the court's position to be concerned with "what the law ought to be." *Id.*

> Carter? No, not if the statutory definition be respected. But it may be argued that stacking is only just in Carter's case because he paid the multiple premiums and this entitles him to the multiple coverages. Stacey Wickline paid no premiums. The point loses force when it is remembered that no third party beneficiaries give the consideration that yields an obligation he [sic] may of right enforce.[39]

Thus by holding that the coverage on the four Carter vehicles could be stacked by a class two insured, the Mississippi Supreme Court in *Wickline* set the stage for a fleet stacking case. The Federal District Court for the Northern District of Mississippi had already made an *Erie* guess that Mississippi would not limit its stacking analysis merely to personal automobile policies.[40]

However, the Mississippi Supreme Court had dropped a hint that it might not allow stacking in a large commercial fleet policy situation in *Cossitt v. Nationwide Mutual Insurance Co.*[41] In *Cossitt* a class two insured church employee was allowed to stack three policies issued to his employer on three church buses, one of which was involved in the accident.[42] The court noted:

> It is a matter of common knowledge that many individuals have from three to seven vehicles, or more, on one policy for family use. *The policy is not considered to be a fleet policy.* As in *Yeager v. Auto-Owners Insurance Company*, 335 N.W.2d 733 (Minn. 1983), we are not faced here with a large, commercial fleet policy.[43]

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[39] *Id.* The court noted that Mills Carter, Jr. paid the premiums for the benefit of all insureds which included the statutory uninsured motorist third party beneficiary, Stacey Wickline. *Id.*

[40] Curry v. Travelers Indem. Co., 728 F. Supp. 1299, 1302 (S.D.Miss. 1989) (taxi driver entitled under Mississippi law to stack uninsured motorist benefits pursuant to employer's business automobile policy); *see also* Ball v. United States Fidelity & Guar. Co., 696 F. Supp. 1117, 1120 (N.D. Miss. 1988) (court allowed stacking under commercial policy, noting that, "whether this . . . policy permits stacking depends on whether multiple premiums were charged and not upon the type of policy").

[41] Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989).

[42] *Id.* at 884. The court reasoned that as the church was designated in the policy as the named insured, the expectation regarding stacking coverage should not be different from the expectation of an individual policy holder. *Id.*

[43] *Id.* (emphasis by court). The Mississippi Supreme Court joined the Minnesota Supreme Court in declining to accept the rationale of other jurisdictions that "to allow stacking would be to make premium costs prohibitively expensive and would not be within the reasonable expectations of the insurer and the employer-policyholder." *Id.* (quoting Yeager v. Auto-Owners Ins. Co., 335 N.W.2d 733, 739 (Minn. 1983)).

B. The Harris *Decision*

The issue of class two stacking in a commercial fleet policy was finally put to rest in *Harris v. Magee*.[44] In *Harris*, the decedent, Larry Magee, died as a result of injuries he sustained when struck by an uninsured motorist while working on a piece of his employer's equipment on the side of the highway.[45] Magee's employer held a commercial automobile liability policy with twenty-two covered vehicles.[46] The trial court allowed stacking of the coverage on all twenty-one of the business vehicles covered by the commercial fleet policy.[47] The insurance carrier appealed to the Mississippi Supreme Court, arguing in part that a class two insured should not be allowed to stack in situations involving a large commercial fleet policy.[48]

The court stated three primary considerations in determining that the coverage on the "fleet" could be stacked:

> 1. We are guided by our uninsured motorist statute, not the jurisprudence of foreign jurisdictions;
>
> 2. Throughout our jurisprudence and in the liberal rules of construction which we have compiled in interpreting our UM statute, we have consistently recognized and allowed a Class II insured to stack uninsured motorist coverage.
>
> 3. Most importantly, our legislature has not seen fit to distinguish a "commercial fleet" policy from any other auto policy. Stacking is a vital cog in our UM scheme. The legislature has not statutorily overruled our stacking decisions; therefore, we assume that stacking is not repugnant to Mississippi public policy.[49]

The court reasoned that if it judicially designated a certain class of policy a "large commercial fleet policy" in order to align itself with

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[44] Harris v. Magee, 573 So. 2d 646, 653 (Miss. 1990).

[45] *Id.* at 648. Magee was crawling from beneath a crane which was disabled on the side of Interstate 20, when he was struck by a van. *Id.*

[46] *Id.* at 649. The insurer, Travelers, was also the worker's compensation carrier and had paid $58,000 on Magee's behalf in worker's compensation benefits.

[47] *Id.* The maximum amount of coverage had been reduced by $25,000, the maximum amount of coverage on any one fleet vehicle, in settlement of the claim of a coworker of the decedent, Larry Magee. *Id.*

[48] *Id.* at 652. The carrier appealed asserting several other grounds, which will not be addressed in this comment.

[49] *Id.* at 653. The court noted that other jurisdictions which precluded class two insureds from stacking under commercial fleet policies compared the potential for high exposure to the premium actually paid. *Id.*

most other jurisdictions, it would in fact create an "exception" to coverage.[50] This construction would contravene the policy that the Mississippi Uninsured Motorist Act should be "construed liberally to provide coverage and strictly to avoid or preclude exceptions or exemptions from coverage."[51]

The court noted applicable rules of stacking had become a "positive gloss" on the statute.[52] Furthermore, since the Mississippi Uninsured Motorist Act did not distinguish a "fleet policy" from any other type of policy, the court stated it would not modify the Act by judicially creating such a definition and distinction out of deference to the legislature.[53] Under *Harris*, the result is that in Mississippi the combined coverage under a commercial fleet policy can be stacked by a class two insured.[54]

C. *Analysis of Class Two Stacking in Other Jurisdictions*

Many courts and jurisdictions, as a general rule, do not allow a class two insured (or a permissive user) to stack uninsured motorist benefits.[55] Furthermore, some jurisdictions have "anti-stacking" stat-

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[50] *Id.* at 654-55. An exception to coverage for a certain class of policy was described as "foreign to our UM statute." *Id.*

[51] Mississippi Farm Bureau Mut. Ins. Co. v. Garrett, 487 So. 2d 1320, 1323 (Miss. 1986); *see also* State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159, 1161 (Miss. 1985) (policy language that will cut down coverage mandated by statute is not to be employed); Matthews v. State Farm Mut. Auto. Ins. Co., 471 So. 2d 1223, 1225 (Miss. 1985) (policies issued under uninsured motorist statute are to be construed liberally to provide coverage, strictly to avoid exemptions from coverage).

[52] *Harris*, 573 So. 2d at 655. Unlike other jurisdictions which have legislatively mandated stacking to be against public policy, Mississippi has retained stacking. *Id.*

[53] *Id.* The court deemed it of special significance that the Mississippi Legislature had never overruled its holding in stacking decisions, and had recently defeated a "proposal" that would have legislatively prohibited stacking. *Id.* There was no "statutory basis" in the act for distinguishing a commercial fleet policy. *Id.* Therefore the court allowed stacking. *Id.*

[54] *Id.* This seems an odd line of reasoning, given that the statute which seemingly must be read literally, never mentions stacking in the first place, stacking being entirely a judicial creation.

[55] *See, e.g.*, Holloway v. Nationwide Mut. Ins. Co., 376 So. 2d 690, 694 (Ala. 1979) (second class insureds, or permissive users, are denied stacking privilege available to first class insureds); Ohio Casualty Ins. Co. v. Stanfield, 581 S.W.2d 555, 559 (Kan. 1979) (where employee was second class insured to his employer's policy, employee precluded from stacking employer's coverage); Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732, 738 (Minn. 1986) (second class insured may not stack coverage); Babcock v. Adkins, 695 P.2d 1340, 1343 (Okla. 1984) (occupants (second class insureds) of motor vehicle may not stack coverage under separate policies solely because of their status as passengers); Utica Mut. Ins. Co. v. Contrisciane, 504 Pa. 328, 473 A.2d 1005, 1011 (1984) (second class in-

utes which allow insurers, subject to certain limits, to include "stack precluding" terms in their policies, or provide in the statute that stacking is contrary to public policy.[56]

Courts have been even less receptive to the idea of allowing a class two insured to stack coverage on a commercial fleet policy by virtue only of his occupancy in the vehicle.[57] In fact, the Mississippi Supreme

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sured not entitled to stack coverage on multiple vehicles); Cunningham v. Insurance Co. of N. Am., 213 Va. 72, 189 S.E.2d 832, 835 (1972) (same).

[56] WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 13.11 (2d ed. 1985); *see, e.g.*, ALA. CODE ANN. § 32-7-23(c) (1989) ("[t]he recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract."); MINN. STAT. ANN. § 65B.49 Subd. 3(a)(6) (Supp. 1990) ("[r]egardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, in no event shall the limit of liability for uninsured and underinsured motorist coverages for two or more motor vehicles be added together to determine the limit of insurance coverage available to an injured person for any one accident."); MONT. CODE ANN. § 33-23-203(c) (1989) ("the limits of coverage specified for each motor vehicle, insured under the policy may not be added together to determine the limit of insurance coverage available under the policy for any one accident."); *see also* LA. REV. STAT. ANN. 22:1406(D)(1)(c) (Supp. 1990) (anti-stacking legislation with limited exceptions); MD. CODE ANN. 48A, § 543(a) (1986) (prohibiting stacking); N.J. STAT. ANN. 17:281.1(c) (Supp. 1990) (uninsured motorist coverage shall not be stacked). *Contra* WIS. STAT. ANN. § 631.43(1) (1980) (statute disapproving inclusion in policies of language designed to prevent stacking).

[57] *See, e.g.*, Fuqua v. Travelers Ins. Co., 734 F.2d 616, 620-21 (11th Cir. 1984) (class two insured employee could not stack uninsured motorist coverage on 27 vehicles insured under commercial fleet policy); Burke v. Aid Ins. Co., 487 F. Supp. 831, 835 (D. Kan. 1980) (second class insured not allowed to stack 44 vehicle commercial fleet policy); Holloway v. Nationwide Mut. Ins. Co., 376 So. 2d 690, 694-95 (Ala. 1979) (uninsured motorist coverage on nine vehicle fleet not available to class two insured killed while driving company car); Lambert v. Liberty Mut. Ins. Co., 331 So. 2d 260, 264-65 (Ala. 1976) (person insured only by virtue of his occupancy of employer's vehicle not entitled to stack coverage on 1,699 vehicles insured by same policy); Marks v. Travelers Indem. Co., 339 So. 2d 1123, 1126 (Fla. Dist. Ct. App. 1976) (class two insured could not stack coverage on seven vehicle fleet under commercial policy because it would upset commercial insurance structure leading to absurd consequences); Lee v. Insurance Co. of N. Am., 7 Haw. App. 338, 762 P.2d 809, 813, *aff'd*, 70 Haw. 120, 763 P.2d 567 (1988) (where premium on private automobile paid by city with employee as only named insured because of employer policy to have some employees use their personal vehicles it is unreasonable to expect uninsured motorist charge for each covered vehicle to allow stacking of entire fleet which would result in "gross absurdity"); Holland v. Hawkeye Sec. Ins. Co., 230 N.W.2d 517, 520-21 (Iowa 1975) (class two insureds not entitled to stack coverage on nine vehicles covered by commercial fleet policy); Ohio Casualty Ins. Co. v. Stanfield, 581 S.W.2d 555, 559 (Ky. 1979) (second class insured employee not entitled to stack uninsured motorist coverage under employer's 63 vehicle commercial fleet policy); Burns v. Fernandez, 401 So. 2d 1033, 1037-38 (La. Ct. App. 1981) (employee who was second class

Court noted in *Harris*, "[I]n dealing with the question of whether a claimant-employee should be permitted to stack the coverages provided under commercial fleet policy insuring several vehicles for which separate premiums were paid, the courts are virtually unanimous [in refusing to allow stacking]."[58]

III. Theories Against Stacking Under a Commercial Fleet Policy

A. The "Risk to Premium" Ratio

Among the courts which do not allow a second class insured to stack uninsured motorist benefits, the most common unifying rationale

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insured permissive user was not entitled to stack coverage on 26 vans insured under commercial fleet policy of employer); Howell v. Harleysville Mut. Ins. Co., 305 Md. 435, 505 A.2d 109, 131 (1986) (second class insured not entitled to stack coverage on 19 vehicle commercial fleet policy); Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732, 738 (Minn. 1986) (employee insured only by virtue of occupancy in vehicle (class two) could not stack under 2,000 vehicle commercial feet policy of employer); Linderer v. Royal Globe Ins. Co., 597 S.W.2d 656, 661 (Mo. Ct. App. 1980) (employee insured only by virtue of his occupancy of vehicle not entitled to stack uninsured motorist coverage on each of 1,420 vehicles covered by policy); Prudential Property & Casualty Ins. Co. v. Continental Ins. Co., 233 N.J. Super. 259, 558 A.2d 848, 850-51 (1989) (officer insured only as occupant [class two] of vehicle not entitled to stack uninsured motorist benefits for each vehicle in township's commercially covered fleet); Aetna Casualty & Sur. Co. v. Craig, 771 P.2d 212, 214 (Okla. 1989) (emphasis in original) ("ONLY class 1 insureds may stack the uninsured motorist protection in a commercial feet insurance policy"); Stanton v. American Mut. Liab. Ins. Co., 747 P.2d 945, 946 (Okla. 1987) (employee "permissive user" not entitled to stack uninsured motorist coverage for 379 vehicles in commercial fleet); Selected Risks Ins. Co. v. Thompson, 520 Pa. 130, 552 A.2d 1382, 1387 (1989) (class two insured, because not "named insured", not entitled to stack uninsured motorist benefits on fleet of fire engines); Miller v. Royal Ins. Co., 354 Pa. Super. 20, 510 A.2d 1257, 1258-59 (1986) (non-designated individual not allowed to stack uninsured motorist coverage under feet policy), *aff'd per curiam*, 517 Pa. 306, 636 A.2d 1049 (1988); Flamini v. General Accident Fire & Life Assurance Corp., 328 Pa. Super. 406, 477 A.2d 508, 514 (1984) (same); Utica Mut. Ins. Co. v. Contrisciane, 504 Pa. 328, 473 A.2d 1005, 1010 (1984) (person who is insured only because of occupancy in covered vehicle insured under commercial fleet policy is not entitled to stack uninsured motorist coverages on all covered vehicles); American Universal Ins. Co. v. Russell, 490 A.2d 60, 63 (R.I. 1985) (passenger injured in vehicle accident could not stack coverage on 83 vehicle fleet under single commercial policy); Cunningham v. Insurance Co. of N. Am., 213 Va. 72, 189 S.E.2d 832, 835-36 (1972) (class two insured not entitled to stack 4,368 vehicles covered under single commercial fleet policy); Continental Casualty Co. v. Darch, 27 Wash. App. 726, 620 P.2d 1005, 1007-08 (1980) (class two insured not entitled to stack coverage on 35 vehicles covered under employer's commercial fleet policy).

[58] *Harris*, 573 So. 2d 646, 653 (Miss. 1990) (citing *Howell*, 305 Md. 435, 439, 505 A.2d 109, 111 (1986)).

is that allowing a class two insured to stack would cause an incredibly high per vehicle exposure for the carrier when compared to the premiums actually paid by the insured.[59] The Mississippi Supreme Court made note of this argument in the *Harris* decision.[60]

If one considers a hypothetical municipal policyholder with a single policy covering one thousand vehicles with $50,000 uninsured motorist coverage per vehicle, then if stacking were allowed in any one single vehicle accident the city would have a possible exposure of $50 million per vehicle.[61] This potential liability has been strongly criticized as absurd,[62] and reaching a magnitude which would upset the entire commercial insurance structure.[63]

Courts examining the consequences of allowing stacking in a fleet situation typically compare the potential liability of the insurer per vehicle to the generally small premium paid, and conclude that stacking would result in a commercially uneconomic, unconscionable, and "absurd result."[64] It seems incongruous that, in order to achieve the ad-

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[59] *Cossitt*, 551 So. 2d at 884. The court notes the potential for high carrier exposure to the premium actually paid by the named insured. *Id.*

[60] *Harris*, 573 So. 2d at 653.

[61] APPLEMAN, INSURANCE LAW AND PRACTICE § 5101 (1981). In his treatise Appleman notes that, although the $50 million per vehicle exposure is a worst case scenario that no carrier could afford to insure, the logic of many cases with smaller fleets compel this result. *Id.*

[62] *Id.*; *see also* Lee v. Insurance Co. of N. Am., 7 Haw. App. 338, 762 P.2d 809, 813, *aff'd.* 730 Haw. 120, 763 P.2d 567 (1988) (allowing commercial fleet coverage to be stacked would result in "gross absurdity").

[63] Marks v. Travelers Indem. Co., 339 So. 2d 1123, 1126 (Fla. App. 1976) (allowing second class insured to stack coverage under commercial fleet policy would upset entire commercial insurance structure).

[64] Howell v. Harleysville Mut. Ins. Co., 305 Md. 435, 439, 505 A.2d 109, 113 (1986). The *Howell* court noted that where all 19 vehicles on the fleet policy were stacked the total exposure was a possible $18,050,000 in exchange for a total uninsured motorist coverage premium of $76, which was an "absurd result". *Id.* Likewise, in Prudential Property & Casualty Ins. Co. v. Continental Ins. Co., 233 N.J. Super. 259, 558 A.2d 848, 850-51 (1989), the Appellate Division of the New Jersey Superior Court criticized stacking as commercially uneconomic and "an absurdity, which no company could possibly afford to insure." *Id.* (citing Lundy v. Aetna Casualty & Sur. Co., 92 N.J. 550, 564, 458 A.2d 106 (1983)).

In Stanton v. American Mut. Liab. Ins. Co., 747 P.2d 945, 947 (Okla. 1987), the court stated that it would not allow extension (by stacking) of uninsured motorist benefits to a permissive user of a single fleet vehicle. *Id.* The court reasoned that allowing a class two insured to stack the fleet coverage under the facts presented would result in an allowable claim of $7,580,000 by an employee without any contribution from him toward securing the coverage. *Id.* The court stated, "such a result is clearly an absurdity." *Id.*

In Continental Casualty Co. v. Darch, 27 Wash. App. 726, 620 P.2d 1005, 1008 (1980), the court refused to allow a permissive user to stack under a commercial fleet

mittedly valid public policy of protecting the public from financially irresponsible drivers, that the Mississippi Uninsured Motorist Act would compel the massive liability exposure that unlimited stacking of a fleet policy by a second class insured will cause to insurance carriers. Although the policy behind the Act is a valid one, such a result could have a disastrous effect on the future economic growth of the state.

B. The "Windfall" to the Insurer

Courts which have allowed a second class insured to stack benefits often conclude that unless the applicable uninsured motorist insurance can be stacked, the insurance carrier receives some type of windfall[65] because under the single policy a separate premium is charged for each unit of coverage on each separate vehicle.[66] The argument then follows that because multiple premiums are provided multiple coverage should be created by stacking to prevent a "windfall" to the insurer of the amount of additional premiums paid over the first vehicle.[67] Upon further consideration, however, it can be seen that the insurer does not receive a windfall if stacking is denied. When an insured purchases au-

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policy where a single accident could create up to $36,750,000 in liability. *Id.* The reason stated was that such a massive amount of coverage would be outside the expectation of the average person purchasing such a policy. *Id.* Therefore, the court stated, "we cannot construe the policy to reach a result that would be unreasonable in light of the commercial setting in which it was written." *Id.*

The fleet stacking issue was likewise addressed in Linderer v. Royal Globe Insurance Co., 597 S.W.2d 656, 661 (Mo. Ct. App. 1980) where the court analyzed as follows:

> If stacking were required for fleet policies there would be $14,200,000 of coverage for each Union Electric vehicle and the total exposure for the entire fleet of 1,420 vehicles would be 1,420 times $14,200,000 or $20,164,000,000, obviously an argument to absurdity, but the actual exposure amounts to millions of dollars. This cannot have been the intention of the Missouri Supreme Court when the opinion in *Cameron Mut., supra* was rendered. Further, if *Cameron Mut.* were to be followed for owners of large fleets of motor vehicles, there is no possible way the fleet owner could limit his uninsured motorist coverage to the statutory minimum, or if the fleet is large, to less than millions of dollars for each individual vehicle. Such result would be unconscionable.

Id.

[65] *See, e.g.*, Currey v. Travelers Indem. Co., 728 F. Supp. 1299, 1301 (S.D. Miss. 1989) ("[I]t is not important who has paid the premiums, but rather that the protection has been purchased").

[66] APPLEMAN, *supra* note 61, § 501 at 449. More than one court has been confused by the apparent windfall received by the insurance carrier in the single policy-multiple vehicle situation. *Id.*

[67] *Id.* The feeling that the insurer somehow receives a windfall results from the charging of separate premiums for each coverage as it applies to a separate vehicle. *Id.*

tomobile liability coverage he generally does so with the contemplation that where he has more than one vehicle, the second or third, et cetera will be operated by someone other than himself.[68] If these other drivers are struck by an uninsured or underinsured vehicle, their injuries will expose the insurer to a loss under that particular provision of the liability policy.[69] Therefore the insurance carrier incurs a greater risk when insuring multiple, additional vehicles for the same basic amount (or "unit") of coverage, i.e. $10,000/20,000, and "this additional risk is the consideration given for the additional premium."[70] Therefore the additional premiums, usually at a discounted rate, charged for additional vehicles are justified by the additional risks assumed by the uninsured motorist carrier and it is not unconscionable or a windfall to deny the multiplication of benefits by the number of vehicles covered by the policy.[71] In fact, some courts have obviously felt that allowing a second class insured to stack coverage of *any* type would result in a windfall to the class two insured because, unlike the "named insured" the permissive user does not pay any premiums for his coverage.[72]

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[68] *Id.*

[69] *Id.* at 450. Under most uninsured motorist policies, any person operating the vehicle with the permission of the named insured, or any adult member of the named insured's household will be covered by the policy. *Id.*

[70] Indiana Ins. Co. v. Ivers, 182 Ind. App. 482, 395 N.E.2d 820, 825 (1979). The actual exposure of an uninsured motorist carrier is "multiplied by the number of vehicles, since different persons will be driving them upon separate occasions and the risk is thereby multiplied. . . ." APPLEMAN, *supra* note 61, § 5106, at 517.

[71] *Ivers*, 182 Ind. App. at 482, 395 N.E.2d at 825; *see also* Kozak v. Detroit Auto. Inter-Ins. Exchange, 79 Mich. App. 777, 262 N.W.2d 904, 907 (1977) (insured not entitled to stack coverage even though three premiums had been paid, because additional premiums represented consideration for extra risk incurred by insuring additional vehicles); Holland v. Hawkeye Sec. Ins. Co., 230 N.W.2d 517, 520 (Iowa 1975) ("courts rejecting the argument payment of multiple premiums entitles the insured to multiple coverages generally do so on the basis that the insurer incurs a greater risk when insuring additional motor vehicles and that this additional risk is the consideration given for the additional premiums").

[72] *See* Burns v. Fernandez, 401 So. 2d 1033, 1037 (La. App. 1981) (second class insureds not allowed to stack because unlike class one insureds they paid no premium for additional coverage); Briley v. Falati, 367 So. 2d 1227, 1228 (La. Ct. App. 1979) (same); Ohio Casualty Ins. Co. v. Stanfield, 581 S.W.2d 555, 558 (Ky. 1979) (arguments in favor of stacking do not apply to permissive user who pays no premium, unlike named insured); Holloway v. Nationwide Mut. Ins. Co., 376 So. 2d 690, 694 (Ala. 1979) (class two insured may not stack because not party to contract and paying no premium); Lambert v. Liberty Mut. Ins. Co., 295 Ala. 414, 331 So. 2d 260, 264-65 (1976) (same); Cunningham v. Insurance Co. of N. Am., 213 Va. 72, 189 S.E.2d 832, 835-36 (1972) (second class insureds do not buy policy or pay any premium, therefore arguments in favor of stacking do not apply to such permissible users); Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783,

Therefore, it is clear that when stacking is denied under a commercial fleet policy, the insurance carrier receives no windfall due to the added risk incurred by the insurer.

C. *The "Reasonable Expectations" Doctrine*

One of the most cited principles used by courts when giving expansive interpretations of policy language is the "reasonable expectations" doctrine.[73] The doctrine is generally stated in the following language: "In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer."[74] The Mississippi Supreme Court has cited, without necessarily adopting, the reasonable expectation doctrine in the following formulation: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[75]

In general, the reasonable expectation doctrine is designed to protect the unsophisticated consumer from the incredibly technical language contained in many insurance policies, most of which are long, complex documents.[76] The consumer is also protected from "unconscionable" restrictions or limitations in the insurance policy itself, which may be categorized as a contract of "adhesion."[77] Because of these factors and the marketing procedures of the insurance industry as a whole, jurisdictions adopting the reasonable expectations doctrine

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790, 457 P.2d 34, 40 (1969) (same).

[73] *See generally* KEETIN & WIDISS, INSURANCE LAW, A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES, § 6.1(a) at 615 (Practitioner's ed. 1988) (discussion of principles justifying expansive reading of insurance policy provisions).

[74] *Id.* § 6.3 at 633. The "reasonable expectations" doctrine is a capsulized expression of the public policy and rationale which have been used as a principle basis of decision in many cases which do not expressly cite the reasonable expectation principle. *Id.*

[75] Brown v. Blue Cross & Blue Shield, 427 So. 2d 139, 141 n.2 (Miss. 1983) (citing Keeton, *Insurance Law Rights at Variance With Policy Provisions* 83 HARV. L. REV. 961, 967 (1970)).

[76] KEETON & WIDISS, *supra* note 73, § 6.3(4) at 633. Policyholders generally do not read their policies due to their length and complexity, and almost never carefully study the policies. *Id.* at 634.

[77] KEETON & WIDISS, *supra*, note 73, § 6.3(4) at 634. Often, even extended consideration of the terms will not fully apprise the insured as to the scope of coverage. *Id.*

refuse to enforce policy provisions, which logically would include anti-stacking provisions, that conflict with the reasonable expectations of the insured.[78]

However, multiple jurisdictions, including some that have never formally adopted the "reasonable expectations" doctrine, have concluded that it is not a reasonable expectation that a second class insured would be able to stack uninsured motorist coverage under a commercial fleet policy.[79] As one author noted, "it seems evident - that is, beyond disputing - that neither the insurer nor the purchasers of uninsured motorist insurance included in a 'fleet policy' contemplate the stacking of coverage for the enhanced protection of persons who are insured as occupants of an insured vehicle."[80] This rationale has likewise been applied to class one insureds, i.e. it is not a reasonable expectation of even a "named insured" [class one] to expect to stack the multiple uninsured motorist coverages under a commercial fleet policy.[81]

Courts considering the issue have noted that second class insureds are not specifically intended to be beneficiaries, pay no premiums, have no contractual relationship with the carrier and thus there is no basis on which a class two insured could reasonably expect coverage.[82] The Missouri Court of Appeals further stated that an insured is "entitled only to that protection which he may reasonably expect from the terms of the policy he purchases," and thus it would not be reasonable that an employee could expect to stack coverage on a 1,420 vehicle fleet.[83]

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[78] *Id.* at 635. In the case of Sparks v. St. Paul Insurance Co., 100 N.J. 325, 495 A.2d 406, 412 (1985), it was noted, "The recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against insurance companies . . . [and] has also led courts to enforce unambiguous insurance contracts in accordance with the reasonable expectations of the insured." *Id.*

[79] WIDISS, *supra* note 55, at 607-08.

[80] *Id.* at 608 (citing Thompson v. Grange Ins. Assoc., 34 Wash. App. 151, 660 P.2d 307, 312 (1983)("to adopt stacking for an insured of the second class would be to reach an unreasonable and completely unexpected result in light of the commercial setting in which the policy was agreed upon")).

[81] WIDISS, *supra* note 55, at 608. *See, e.g.*, Fireman's Fund Ins. Co. v. Chapman, 664 F. Supp. 1316, 1318 (D. Alaska 1987) (in view of plain language of policy, insured could not reasonably believe that policy limits would be stacked); Miller v. Royal Ins. Co., 354 Pa. Super. 20, 510 A.2d 1257, 1258 (1986) (neither class one nor class two insured allowed to stack under specific policy).

[82] Selected Risks Ins. v. Thompson, 520 Pa. Super. 130, 552 A.2d 1382, 1384-85 (1989) (quoting Utica Mut. Ins. Co. v. Contrisciane, 504 Pa. Super. 328, 338-39, 473 A.2d 1005, 1010-11 (1984)).

[83] Linderer v. Royal Globe Ins. Co., 597 S.W.2d 656, 661 (Mo. App. 1980). A reasonable expectation of the named insured is not necessarily a reasonable expectation by a

The Washington Court of Appeals further noted that "[t]he average person purchasing this policy would not expect such coverage" with regards to stacking of uninsured motorist benefits under a commercial fleet policy.[84] The same court also noted that to allow a class two insured to stack under a commercial fleet policy would, "be unreasonable in light of the commercial setting in which it [the policy] was written."[85] Thus it can be seen that the public policy interests which compel many courts to judicially restrict language in insurance policies do not compel such limitations in the field of commercial fleet insurance. This line of reasoning was not mentioned by the Mississippi Supreme Court in the *Harris* decision.

IV. Possible Solutions

Allowing a class two insured to stack coverage under a commercial fleet policy gives rise to undesirable excessive liability exposure to the insurance carrier which is outside the reasonable expectations of the parties to the insurance contract. The Supreme Court of Hawaii used compelling reasoning when faced with a similar stacking question on a large commercial, albeit not fleet, policy.

After noting that the purpose of Hawaii's uninsured motorist statute was to encourage voluntary protection of individuals from uninsured motorists unable to pay for the injuries they caused, the court stated:

> Allowing injured persons to recover by stacking benefits under a personal automobile insurance policy is consistent with the legislative purpose. We do not find, however, either by statutory provision or compelling precedent, that public policy in Hawaii requires uninsured motorist benefits to be aggregated under a group policy covering 1,106 unrelated vehicles. To allow stacking in this case for a total of $27 million dollars in uninsured motorist coverage would not serve to promote the statutory purpose and may even undermine it. Such a dramatic increase in exposure may well lead to increased premiums causing employers such as the City and County of Honolulu to decline to purchase voluntary uninsured motorist coverage at

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class two insured. *Id.*

[84] Continental Casualty Co. v. Darch, 27 Wash. App. 726, 620 P.2d 1005, 1008 (1980) (citing Ames v. Baker, 68 Wash. 2d 713, 415 P.2d 74 (1966).

[85] *Darch*, 620 P.2d at 1008 n.5. Potential liability could be as high as $18,375,000 or even $36,750,000. *Id.*

> all. While the principle of "stacking" was initially created by this court to serve the public interest, it need not be extended indefinitely to the point where it no longer serves that interest.[86]

It is clear that the Mississippi Supreme Court feels compelled by the jurisprudence and the literal language of the Mississippi Uninsured Motorist Act to read the statutes to allow stacking, even in the area of a commercial fleet. There is much the Mississippi Legislature could do to ease the court's burden.

A. Legislative Solutions

Because one of the main purposes of uninsured motorist insurance is to cover shortcomings of financial responsibility laws,[87] a re-drafting of Mississippi's financial responsibility statute would go a long way toward eliminating the need to stack coverage of any type.

In effect, the safety responsibility law in Mississippi, found at section 63-15-11 of the Mississippi Code, is a first-bite law, in that it allows one accident before an owner or operator of a motor vehicle without liability insurance is required to show proof of financial responsibility.[88] By requiring all motor vehicle operators to carry the minimum liability limits stated in section 63-15-11(e) of the Mississippi Code, there would be a dramatic decrease in the number of uninsured motorists, thus in many cases eliminating the need to "stack" altogether.

Further, because the Mississippi Supreme Court is unwilling to do so, the legislature could legislatively distinguish the commercial fleet policy from other personal automobile liability policies, thus giving effect to the reasonable commercial expectations of the parties to the insurance contract.

B. Judicial Solutions

Additionally, because the Mississippi Supreme Court has stated that it is not uncommon for an individual to have from three to seven vehicles on one policy, the court could judicially limit the recovery

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[86] Lee v. Insurance Co. of N. Am., 70 Haw. 120, 763 P.2d 567, 570 (1988). The Hawaii court analyzed the excessiveness which would occur through stacking. *Id.*

[87] *See supra* notes 3-5 and accompanying text.

[88] State Farm Mut. Auto. Ins. Co. v. Mettetal, 534 So. 2d 189, 192 (Miss. 1988). In Mississippi, there is no requirement that a motorist or operator of a vehicle carry liability insurance. *Id.*

under a commercial fleet policy to seven vehicles, thus striking some balance between the liability to premium ratio, valid notions of public policy and the reasonable expectations of the parties to the insurance contract.

Another final remedy which could be provided by either the Mississippi Legislature or the Mississippi Supreme Court would be to limit the amount of uninsured motorist coverage which could be stacked to the liability limit on the overall policy itself.

The Mississippi Uninsured Motorist Act provides that an insured may purchase additional uninsured motorist coverage which exceeds the minimum statutory requirement of the Mississippi Motor Vehicle Safety Responsibility Law.[89]

The statute provides:

> [H]owever, at the option of the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of bodily injury liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section.[90]

When the insured purchases additional uninsured motorist coverage for himself, he also protects potential second class insureds, who are at this point unknown members of society. By the express wording of the statute, the named insured may protect himself and "society" up to the policy limit of bodily injury, but no further. However, by allowing a class two insured to stack multiple vehicles in a commercial fleet, the coverage could easily exceed the maximum bodily injury limit of the policy.

Thus, by allowing class two stacking under a commercial fleet policy, the end result becomes that the named insured provides more coverage for "society" than he does for himself. This result is in conflict with the literal language of the statute itself, as well as the obvious legislative intent.

Therefore, the "judicial eye, reading only the statute" could clearly limit the stacked recovery to the bodily injury limit of the automobile policy itself, thus achieving a result consistent even with the most literal wording of the statute, as well as be commercially practicable, and consistent with the reasonable expectations of the parties to the insurance contract.

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[89] MISS. CODE ANN. § 83-11-101(1) (Supp. 1990).

[90] *Id.*

V. Conclusion

The Mississippi Uninsured Motorist Act has a laudable purpose in protecting motorists from financially irresponsible drivers.[91] However, allowing the stacking of coverage under a commercial fleet policy by a second class insured is counterproductive to this public policy. Allowing stacking for a class two insured under these policies creates an astronomical increase in the ratio of risk exposure to premiums paid.[92] The uninsured motorist carrier receives no windfall from the denial of coverage, and the second class insured receives massive amounts of coverage over that of the occupied vehicle without having paid any premium.[93] Furthermore, it is outside of the reasonable expectations of both parties to the insurance contract to allow a second class insured to stack such coverage.[94]

It seems likely that the Mississippi Supreme Court's decision in *Harris v. Magee* will in the end undermine the social policies which initially created uninsured motorist insurance coverage. Such dramatic increases of exposure on the part of uninsured motorist insurance carrier are bound to result in a steady increase in premiums so as to reflect the additional risk. The increased premium cost will, of course, be passed on from the commercial entity and be reflected later in the cost of goods and services to the general public. Additionally, higher premiums caused by the necessary adjustment in the risk to premium ratio may in fact discourage or prohibit purchase of UM coverage. This alone could have a severe adverse effect on new business, and society at-large. Furthermore, the stacking-related increase in coverage is bound to impact on the judicial system as further litigation is required to flesh out the limits of this new coverage. Those litigation costs will likewise be passed on to the consumer. By the Mississippi Supreme Court or Legislature adopting any of the above proposed solutions, or by creating some other approach, the public will continue to be protected from financially irresponsible drivers, the reasonable expectations of the parties to the insurance contract will be honored; thus society will reap benefits, as opposed to being burdened with excessive premiums.

Mark Edwards

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[91] *See supra* notes 3-5 and accompanying text.
[92] *See supra* notes 57-63 and accompanying text.
[93] *See supra* notes 64-70 and accompanying text.
[94] *See supra* notes 71-83 and accompanying text.

RECENT DECISIONS

Set-Off—Set-Off of Judgments Not To Be Used To Create Windfall or Reduce Contractual Obligations of Insurance Companies

Plaintiff[1] filed suit in the Circuit Court of Harrison County, Mississippi against defendants driver[2] and owner[3] of a vehicle to recover for injuries[4] sustained as the result of a collision.[5] Defendant/driver counterclaimed for his injuries[6] and defendant/owner counterclaimed for damage to his automobile.[7] Testimony was contradictory[8] regarding

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[1] Plaintiff, Andrew W. Welter, was driving in the eastbound lane at the time of the collision. Pham v. Welter, 542 So. 2d 884 (Miss. 1989).

[2] *Pham*, 542 So. 2d at 884. Defendant/driver, Tan Minh Pham, was driving in the westbound lane at the time of the collision. *Id.* at 886.

[3] *Id.* at 886. Defendant/owner of the vehicle, Thua Van Tran, employed the defendant/driver. *Id.*

[4] *Id.* at 885. The trial court found total damages to plaintiff to be $40,000. *Id.*

[5] *Id.* at 886. The head-on collision occurred on a rainy afternoon near an intersection on a curving road near Biloxi, Mississippi. *Id.*

[6] *Id.* at 889. Defendant/driver presented evidence of $28,682.70 in special damages, broken down as follows:

Biloxi Regional Medical Center	$21,731.70
Various Doctors	4,951.00
Future Surgery Estimate	1,500.00
Loss Wages	500.00
	$28,682.70

Id.

[7] *Pham*, 542 So. 2d at 885. Defendant/owner claimed the value of his destroyed car. *Id.*

[8] *Id.* at 886. According to the court, testimony from the parties was "poles and light

the cause of the accident, prompting the trial court to return a comparative negligence verdict finding plaintiff forty percent negligent and defendant/driver sixty percent negligent.[9] Both defendants filed motions for additurs[10] or, in the alternative, a new trial on the issue of damages.[11] On rehearing, the trial court ordered an additur for defendant/owner[12] but denied the motions of defendant/driver.[13] Defendant/driver appealed[14] to the Mississippi Supreme Court and plaintiff cross-appealed.[15] Because of dual representation of plaintiff during trial and

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years apart." *Id.* Plaintiff testified that defendant/driver crossed the centerline and that the tires of the car were "balding," while defendant/driver alleged that he crossed the centerline only after being forced across the line by a station wagon which ran a stop sign at the intersection. *Id.* Supporting plaintiff's contentions, police officers testified that there were skidmarks crossing the centerline. *Id.* However, testimony by witnesses on defendant/driver's behalf confirmed his differing account of the accident. *Id.*

[9] *Id.* at 885. The trial court found plaintiff 40% and defendant/driver 60% negligent, and awarded damages of $40,000 to plaintiff, and $30,000 to defendant/driver. *Id.* The court awarded nothing to defendant/owner. *Id.*

[10] *Id.* at 887. Defendant/driver argued that while $30,000 covered his proven special damages, the award did not adequately compensate him for pain and suffering. *Id.* Defendant/owner was awarded nothing for his loss and, therefore, sought additur. *Id.* at 885.

[11] *Id.* The Mississippi Additur/Remittitur Statute provided for authority and conditions for imposition of additurs and remittiturs as follows:

> [t]he supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

MISS. CODE ANN. § 11-5-55 (1972); *see also* Biloxi Elec. Co. v. Thorn, 264 So. 2d 404, 405 (Miss. 1972) (first recognition by Mississippi court of additur and guidelines for application).

[12] *Pham*, 542 So. 2d at 885. The trial court ordered a $2,500 additur to defendant/owner for the damage to his car reduced by the 60% negligence of defendant/driver. *Id.*

[13] *Id.* at 885. In addition to denying defendant/driver's motion for additur, the circuit court denied the defendant/driver's motion for remittitur of the $40,000 award to plaintiff without explanation. *Id.*

[14] *Id.* at 885-86. Defendant/driver appealed based on the overruling of his motions for additur with respect to his award, and remittitur of plaintiff's award. *Id.* at 886. The alleged error of the trial court in denying defendant/driver's motion for remittitur of plaintiff's award was not addressed by the Mississippi Supreme Court on appeal. *Id.*

[15] *Id.* at 890. Plaintiff's cross appeal was based in part on allegations that the trial

appeal,[16] plaintiff's personal counsel and counsel hired by plaintiff's insurance carrier made contradictory assignments of error.[17] The error concerned the trial court's failure to correct judgment to a single judgment in accordance with the Mississippi Counterclaim Statute.[18] On appeal, the Mississippi Supreme Court, *held*, affirmed on the question of not correcting judgment.[19] Where the application of set-off or net-

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court erred in granting a comparative negligence instruction. *Id.* On appeal, the instructions were found to be proper. *Id.* at 893-94. Additionally, plaintiff claimed that the verdict contradicted the "overwhelming weight of the evidence" and, further, asserted errors in the instructions regarding the agency of defendant/driver. *Id.* at 885-86. The court, on appeal, did not address these issues. *Id.*

[16] *Id.* at 890. Russel S. Gill represented plaintiff in the original suit, but the firm of Bryan, Nelson, Schroeder and Compton was retained by plaintiff's insurance carrier, State Farm Mutual Automobile Insurance, Co. for purposes of "representing" plaintiff during the appeal. *Id.*

[17] *Pham*, 542 So. 2d at 891. Disagreement arose between the two sets of attorneys when counsel hired by plaintiff's insurance carrier assigned as error that the trial court judge should have corrected judgment, contrary to the interests of the plaintiff. *Id.* Plaintiff's original counsel, however, made a contrary motion in his client's interest, stating that the trial court acted properly in not correcting the judgment to a single judgment. *Id.* at 886. The court, in its opinion, emphasized the poor ethics which counsel hired by the insurance company exhibited in representing one client at the expense of another. *Id.* at 893. State Farm, plaintiff's insurance carrier, attempted to have the $12,000 owed by plaintiff to defendant/driver ($30,000 reduced by 60% negligence of defendant/driver) and $24,000 owed to plaintiff by defendant/driver ($40,000 reduced by 40% negligence of plaintiff) set off against each other, thus producing a single judgment. *Id.* at 891. As a result, State Farm would owe defendant/driver nothing while defendant/driver's insurance carrier would owe only $12,000 to plaintiff ($24,000 less $12,000). *Id.* at 892. The motion to correct judgment made by counsel hired to "represent" plaintiff would, in effect, have deprived plaintiff of $12,000 of the $24,000 to which he was entitled based on the trial court judgment. *Id.*

[18] *Id.* at 891. The Mississippi Supreme Court, interpreting MISS. CODE ANN. § 11-7-69 (1972) stated:

> [i]f it appears that the plaintiff's demand is valid and exceeds that of the defendant, the plaintiff shall have judgment for only that portion of his demand which exceeds the valid demand of the defendants, with costs to court, but if it appears that the demand of the defendant is valid, and exceeds the demand of the plaintiff, the defendant shall have judgment for the amount by which his claim exceeds the claim of the plaintiff, with costs of court.

Pham, 542 So. 2d at 891; *see also* Shipman v. Lovelace, 215 Miss. 141, 144, 60 So. 2d 559, 560 (1952) (court has inherent power authority to correct judgment).

[19] *Pham*, 542 So. 2d at 894. The court found that it was proper not to set-off the judgments into a single award to plaintiff. *Id.* In addition to the holding on the set-off issue, the court made several other rulings in its opinion including the awarding of a $30,000 additur to defendant/driver based on the inadequacy of the jury award. *Id.* Because defendant/driver had proven special damages amounting to $28,682.70, the $30,000 award barely covered his special damages, leaving only $1,319.30 to compensate him for pain and suffering. *Id.* at 887. The court found this award so low as to evidence bias,

ting of judgments would serve to diminish the contractual obligations of an insurer to its insured, the doctrine should not apply. *Pham v. Welter*, 542 So. 2d 884 (Miss. 1989).

Set-off involves reducing one demand or claim by another demand or cross claim.[20] The concept of set-off originated in ancient Rome as the doctrine of "compensatio."[21] While in ancient times, application of set-off was limited to claims that originated in single contracts, a broader interpretation developed through the years.[22] However, England refused to adopt set-off into the common law system, primarily because the English system sought to reduce actions to single issues.[23] Nevertheless, because set-off was so useful in preventing circuity of action[24] and multiplicity of suits,[25] England finally enacted the concept of set-off by statute.[26] America was also reluctant to accept set-off but

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prejudice, and passion, and accordingly, awarded an additur of $30,000. *Id.* at 889. With respect to the comparative negligence issue, the court found that where evidence existed to support a comparative negligence instruction, such as the conflicting testimony regarding the accident cause, it was not error to give such an instruction. *Id.* at 893-94.

[20] Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528 (1913). Strictly speaking, the Court defined set-off as a counterclaim by a defendant against a plaintiff. *Id.* In a broader sense, however, it involved a claim by one party to partially or fully satisfy what he owed to another party. *Id.* As a practical matter, set-off involved bringing two obligations into the presence of each other and making the obligations "extinguish" themselves through judicial action. Blount v. Windley, 95 U.S. 173, 179 (1877). Therefore, instead of each party paying the other, the party owing the larger amount would simply pay the other party the difference between the two amounts. *Id.*

[21] Sepinuck, *The Problems With Setoff: A Proposed Legislative Solution*, 30 WM. & MARY L. REV. 51, 51-54 (1988) (discussing historical background of set-off).

[22] *Id.* at 51-52. Set-off did not reach beyond application to contract matters until the time of Marcus Aurelius and Justinian, when the doctrine began to embrace transactions that arose from real and personal actions. *Id.*

[23] *Id.* at 52. The interjection of collateral claims and issues contradicted the basic philosophy of the system and probably seemed "intolerable" to the English courts. *Id.*; *see also* SEDGWICK, DAMAGES § 1031 (9th ed. 1912) (describing attitude toward set-off at early English common law).

[24] Sepinuck, *supra* note 21, at 52. Circuity of action is defined as, "[a] complex, indirect, or roundabout course of legal proceeding, making two or more actions necessary in order to effect that adjustment of rights between all the parties concerned in the transaction which, by a more direct course, might have been accomplished in a single suit." BLACK'S LAW DICTIONARY 125 (5th ed. 1983).

[25] *Sepinuck*, *supra* note 21, at 52. Early chancery courts in England recognized how unfair it was to require two suits to settle claims when parties were limited in their financial resources and, accordingly, found ways around the legal formalities. *Id.*

[26] Carruth v. Easterling, 247 Miss. 364, 374, 150 So. 2d 852, 857 (1963). A 1706 English statute permitted the filing of several pleas in defending an action. *Id.* However, a defendant had no right to specifically plead set-off prior to the passage of 2 Geo. II., ch. 24, sect. 4. Hall v. United States, 91 U.S. 559, 562 (1875). The statute provided that,

eventually implemented the concept by statute.[27] The usefulness of set-off was limited in its early stages by requirements that the claim arise out of a contract or judgment and that the claim be liquidated.[28] Set-off was further limited by the requirement that a defendant must have asserted a claim against a plaintiff independent of the "transaction" that gave rise to plaintiff's claim.[29]

The original limited nature of set-off in early America is well illustrated in the case of *Thornton v. Wynn*.[30] In *Thornton*, plaintiff sold a celebrated race horse to defendant after making untrue assertions regarding the soundness and pedigree of the horse.[31] After learning that the horse was unsound and broken down at the time of the sale, defendant refused to pay the balance due on the horse and alleged breach

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"where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and that such matter may be given in evidence under the general issue." *Hall*, 91 U.S. at 562; *see also* Raymond v. State, 54 Miss. 562, 565 (1877) (set-off was purely statutory right, non-existent at common law).

[27] Washington-Southern Navigation Co. v. Baltimore Philadelphia Steamboat Co., 263 U.S. 629, 636 (1924). Set-off was originally rejected in America just as in England. *Id.* It was not until 1813 that Congress gave federal courts the power to compel the consolidation of actions. *Id.* at 636-37 (citing The North Star, 106 U.S. 17, 27 (1882)).

[28] WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1401 (1971). The common law doctrine of set-off was adopted in early American law with modifications. *Id.* For instance, early codes permitted the granting of affirmative relief and eliminated the liquidated amount limitation. *Id.* Closely related to the concept of set-off was that of recoupment, which was recognized at common law as far back as the reign of Henry VIII. SEDGWICK, *supra* note 23, § 1034. Recoupment also involved the right of a defendant to cut down or eliminate a plaintiff's demand but differed from set-off in that the claim against plaintiff had to arise out of the same transaction or set of circumstances that gave rise to plaintiff's claim. Raymond v. State, 54 Miss. 562, 563 (1877). The court stated that there were three basic distinctions between set-off and recoupment. *Id.* Specifically, the court stated that recoupment arises out of matters connected with plaintiff's action; it does not matter whether debt is or is not liquidated; it is controlled by common law principles rather than statute. *Id.*; *see also* Hayes v. Slidell Liquor Co., 99 Miss. 545, 546, 55 So. 356, 358 (1911) (distinctions between set-off and recoupment); Barclays American/Business Credit, Inc. v. Paul Safran Metal Co., 566 F. Supp. 254, 257 (N.D. Ill. 1983) (distinctions between set-off and recoupment not as important in modern practice having been largely replaced by modern counterclaim practice); WRIGHT & MILLER § 1401 (counterclaim today finds roots in doctrines of set-off and counterclaim). *See generally* 20 AM. JUR. 2D *Setoff and Counterclaim* § 6 (1965) (describing distinctions and similarities between recoupment and set-off).

[29] *Raymond*, 54 Miss. at 563. Set-off arose from transactions "extrinsic" to plaintiff's cause of action. *Id.*

[30] 25 U.S. (12 Wheat.) 183 (1827).

[31] *Thornton*, 25 U.S. (12 Wheat.) at 185. Plaintiff claimed that the horse was fit to race when the horse was "utterly unsound, and broken down." *Id.* Also, plaintiff had failed to furnish the pedigree which was essential to the value of a horse. *Id.*

of warranty as a defense in answer to plaintiff's suit for breach of contract.[32] However, the jury returned a verdict for plaintiff.[33] On appeal, the United States Supreme Court framed the issue as whether the breach of warranty was a sufficient defense to prevent plaintiff from recovering, unless plaintiff, at the time of the sale, knew the horse's condition.[34] The Supreme Court affirmed the decision of the trial court by not allowing the breach of warranty defense, stating that if the sale is absolute, the vendee "is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article" which, in effect, required defendant to file a separate suit in order to assert the breach of warranty defense.[35]

As the policy of avoiding multiple litigation took hold in America, the *Thornton* decision was sharply criticized in *Withers v. Greene*[36] for creating circuity and injustice.[37] In *Withers*, a very similar situation occurred involving the sale of two fillies by a seller who made false assertions regarding their soundness and pedigree.[38] When the purchaser refused to pay the balance due, the seller sued for the balance and the purchaser defended by claiming fraud, failure of consideration,

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[32] *Id.* Defendant had paid $2,000 of the $3,000 purchase price at the time of the suit. *Id.*

[33] *Id.* at 186. Defendant lost at trial court level but appealed on grounds of improper jury instructions. *Id.* The instructions stated, in part, that the breach of warranty was not a sufficient defense to prevent plaintiff from recovering unless it was shown that plaintiff knew of the facts at the time of the sale to defendant. *Id.*

[34] *Id.* According to this instruction, plaintiff, in order to prevail, must have known at the time of the sale that the horse was unsound and broken down. *Id.*

[35] *Id.* at 193. In effect, the Court said that defendant would have to bring a separate action based on breach of warranty rather than asserting the defense in the action for breach of contract. *Id.*

[36] 50 U.S. (9 How.) 213, 225 (1850).

[37] *Withers*, 50 U.S. (9 How.) at 225. The Court in *Withers*, in agreement with the Alabama Supreme Court in Moorehead v. Gayle, 2 Stew. & P. 224 (Ala. 1832), remarked on the rigidity of the rule in *Thornton* emphasizing the injustice of requiring a vendee to resort to a cross action "which remedy, on account of its dilatory nature and circuitous form, is by this court and many others of high authority deemed inconsistent with justice, and more correct rules of modern practice." *Withers*, 50 U.S. (9 How.) at 225. The law favored and encouraged the adjustment of claims by defendants in plaintiff's action rather than in separate actions since such a practice avoided "circuity of action, inconvenience, expense, consumption of the courts' time, and injustice." Chicago & N.W. Ry. Co. v. Lindell, 281 U.S. 14, 17 (1929).

[38] *Withers*, 50 U.S. (9 How.) at 220. Defendant purchased two fillies for $4,000, paying $1,000 down and executing a note for the remainder. *Id.* Defendant purchased the fillies for their "blood and for the turf," but it turned out that plaintiff had made false representations regarding their quality. *Id.*

and breach of warranty.[39] After plaintiff obtained a judgment for the balance due, the Supreme Court reversed the trial court, stating that the trial court should have allowed defendant to plead his claims in defense of plaintiff's action.[40] The *Withers* court stated that regardless of the rules laid down in the past, and for reasons of justice, convenience, and avoidance of the expense of litigation, American courts have repeatedly held that where a failure of consideration or breach of warranty exists as a defense, regardless of fraud, a party shall not be forced to assert such claims in a separate cross action.[41]

Set-off gained a more liberal application through the years in America, as demonstrated in banking cases,[42] but courts were reluctant

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[39] *Id.* The lower court sustained a demurrer in plaintiff's behalf to the defenses and ordered defendant to pay the $3,000 balance. *Id.* at 216. The Court noted that the cause was, in essence, a contract action in character but that the issues went beyond the local boundaries of jurisprudence. *Id.* at 220. Nevertheless, since the contract arose in Alabama, their local laws formed the basis of the opinion. *Id.* at 221.

[40] *Id.* at 234. The trial court had sustained plaintiff's demurrer to the defenses and ordered defendant to pay the $3,000 balance. *Id.*

[41] *Id.* at 220. Another statement on the policy behind allowing set-off was found in the Court's quotation of the Alabama Supreme Court: "[i]t is our policy to avoid circuity of action, that litigation may be stopped in the germ, before it is permitted to put forth its branches." *Id.* at 226.

[42] *Blount*, 95 U.S. at 173. The Court examined a statute enacted in North Carolina that specified that bank notes would be effective as set-off on debts. *Id.* at 174-75. A bank official had previously sued the current plaintiff as a surety on a note and plaintiff attempted to pay the judgment with notes of that same bank, but plaintiff refused to accept them, desiring United States legal tender instead. *Id.* at 174. After being ordered to accept the notes as set-off of the judgment, plaintiff appealed. *Id.* In affirming the trial court, the Supreme Court stated that it was a longstanding principle that a "debt or obligation may be set off or counterbalanced against another, so that while the obligation of both is recognized, both are satisfied in law and discharged without the payment of money on either; and this is done by the courts without the consent of the party and against his will." *Id.* at 176. The Court also pointed out that it was within the competency of the legislative bodies to provide set-off remedies. *Id.* at 177. Recognizing the reluctance of courts to accept set-off, the Court remarked, "[w]hy, indeed, in cases of mutual debts, independently of any notion of mutual credit, courts of equity should not have at once supported and enforced the doctrine of the universal right of set-off as a matter of natural equity, it is not easy to see." *Id.* at 178 (quoting J. STORY, EQUITY JURISPRUDENCE, § 1438-44 (1972)). *But see* Melamed v. Lake County Nat'l Bank, 727 F.2d 1399, 1404 (6th Cir. 1984) (allowance of set-off within discretion of trial court and not to be set aside unless clear abuse of discretion).

In a later case, a bank sued defendant on a $10,000 note and defendant counterclaimed based on services performed by him. Merchants' Nat'l Bank v. Clark-Parker, 215 Cal. 296, 9 P.2d 826, 827 (1932). Defendant was denied his counterclaim which, in effect, denied him the right to set up a separate action since the statute of limitations period ended during the pendency of plaintiff's suit. *Id.* at 827. The California Supreme Court held that the counterclaim should have been allowed since the policy toward liberal ex-

to extend the concepts of set-off to tort actions.[43] As in the rest of the country, set-off found its way into Mississippi by statute, and was, similarly, limited in application in early cases.[44] Mississippi courts emphasized that a party could not maintain a cross-action or set-off in a suit when the cross-claim denied plaintiff's action or relied on an independent cause of action.[45] The statutory basis for set-off in Mississippi changed little over the years providing, basically, that where there was mutual indebtedness between the parties, the defendant could use any

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tension of the right to counterclaim would otherwise not be served. *Id.* at 828; *see also* Scott v. Armstrong, 146 U.S. 499, 507 (1892) (ordinarily set-off will be applied where mutual obligation grows out of same transaction and insolvency on one hand will justify setting off debt on other hand).

[43] Bloodworth v. Stevens, 51 Miss. 475, 479 (1875). In England, it was well settled that set-off could not be pleaded as a defense to torts since set-off does not justify a tortious act. *Id.* However, in this case, the court allowed a tenant to use recoupment to reduce the rent owed to an intestate based on the intestate's failure to keep a fence in repair which, in turn, allowed livestock to damage the tenant's crops. *Id.* at 478-79; *see also* Dushane v. Benedict, 120 U.S. 630, 640-41 (1886) (under Pennsylvania statute defendant could plead set-off in contract actions but defendant could not set-off based on claim sounding in tort only); Carruth v. Easterling, 247 Miss. 364, 374, 150 So. 2d 852, 857 (1963) (statute did not allow defendant to plead replevin as set-off for unrelated debts).

[44] Barnes' Adm'r v. Lloyd, 2 Miss. (1 Howard) 584 (1837). Plaintiff, administrator of the estate, sued for a debt owed by defendant and defendant pleaded set-off based on his payment of other debts at request of plaintiff's intestate. *Id.* The administrator denied the setoffs as being barred by the statute of limitations. *Id.* at 585. The court, in allowing the set-off, stated that the statute did not apply to set-off and that they were unaware of any case where the statute of limitations was applied with respect to set-off. *Id.* at 587. According to the court, "[t]he Revised Code, 113, only allows set-off and payment to money, bonds or notes." *Id.* at 588.

While Mississippi courts were slow to apply set-off in tort cases, Mississippi became the first state to adopt comparative negligence in 1910. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 702 (1960). Accordingly, the premises of set-off were further shaped in Mississippi regarding dividing damages, since damages were thereafter to be diminished in proportion to the amount of negligence of the respective parties. Natchez & S.R.R. Co. v. Crawford, 99 Miss. 697, 717, 55 So. 596, 599 (1911). In *Natchez*, the Mississippi Supreme Court recognized the constitutionality of the comparative negligence statute provided in the Acts of 1910. *Id.* at 718-19, 55 So. at 599-600.

[45] Shewalter v. Ford, 34 Miss. 417, 419 (1857). Plaintiff sued defendant for the $300 he had paid of the $1,050 purchase price for a slave that defendant had warranted to be "sound." *Id.* Shortly after the purchase, the slave died of pneumonia. *Id.* at 420. In defense, defendant/seller filed in his answer a claim for the unpaid balance of $750. *Id.* at 418. The court refused to allow the defense stating that it could not be considered a set-off since it totally denied plaintiff's action. *Id.* at 419. Furthermore, even considering it as a cross-action the result would be the same since a party could not deny plaintiff's action and at the same time set up an independent and inconsistent cause of action. *Id.*

debt which he may have against the plaintiff to set off the demand of the plaintiff.[46]

Mississippi, while recognizing set-off and counterclaims in contract suits and the like, was reluctant to apply such concepts in tort actions, as illustrated in *Moore v. Abdalla*.[47] In *Moore*, plaintiff brought a negligence action, arguing that defendant had caused a car accident which damaged plaintiff's automobile, and defendant counterclaimed for repair costs to his automobile.[48] Plaintiff demurred, claiming that a defendant could not offer a counterclaim in a tort action, and the trial court sustained the demurrer.[49] On appeal, the Mississippi Supreme Court reasoned that contrary to what many bar members thought the rule should be, Mississippi law, with regard to tort actions, did not provide for counterclaims in the same suit, regardless of the fact that the same transaction or occurrence gave rise to the counterclaim.[50] This decision received sharp criticism in later years based on its inefficiency in requiring multiple suits to settle disputes that arose out of the same situation.[51] Finally, in 1952, the Mississippi legislature enacted a stat-

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[46] Hoover Commercial Co. v. Humphrey, 107 Miss. 810, 818, 66 So. 214, 215 (1914). Plaintiff/buyer sued defendant/seller for breach of a contract related to the sale of 50 bales of cotton. *Id.* at 816, 66 So. at 215. Defendant asserted a claim of set-off based on the loss sustained as a result of having to sell the cotton at a lower price. *Id.* at 816-17, 66 So. at 215. Plaintiff lost at the trial level and appealed the allowance of the set-off plea of defendant. *Id.* at 817-18, 66 So. at 215. The Mississippi Supreme Court affirmed the lower court based on the Mississippi set-off statute, MISS. CODE ANN. § 745 (1906), which provided in pertinent part that, "[w]here a mutual indebtedness exists between the plaintiff and defendant, the defendant may plead and set-off against the demand of the plaintiff any debt . . . which he may have against the plaintiff." MISS. CODE ANN. § 745 (1906). The court also noted that the language of the 1906 Code was almost identical to the Codes of 1892, 1880, 1871, and 1857. *Hoover*, 107 Miss. at 818, 66 So. at 215. The court also noted that the *Shewalter* decision, had a significant influence on recent codes, especially with regard to mutuality of indebtedness. *Id.* at 820, 66 So. at 216.

[47] 197 Miss. 125, 19 So. 2d 502 (1944).

[48] *Moore*, 197 Miss. at 125, 19 So. 2d at 502. Both automobiles were damaged in the collision and each party sought recovery from the other. *Id.*

[49] *Id.* at 128, 19 So. 2d at 502. After denying defendant's counterclaim, plaintiff won and was awarded the full amount of his claim notwithstanding the court's finding that both drivers were negligent. *Id.* at 128-30, 19 So. 2d at 502-03.

[50] *Id.* at 128, 19 So. 2d at 503. The court described the plea of defendant in terms of a recoupment, which could only be asserted defensively. *Id.* at 129, 19 So. 2d at 503. Note, however, that the court sent the case back to the lower court on the question of damages since the award had not been reduced in accordance with MISS. CODE ANN. § 1454 (1942), the comparative negligence statute. *Id.* at 130, 19 So. 2d at 504.

[51] Stennis, *Pleading, Practice and Procedure*, 18 MISS. L.J. 63, 70 (1946). In discussing *Moore*, Stennis pointed out that the reasoning demonstrated a "striking defect in our procedural law." *Id.* at 70. For the defendant to have asserted his claim affirmatively, he

ute which permitted the resolution of counterclaims arising in tort actions in a single proceeding rather than requiring a separate suit to resolve cross-claims,[52] so that statute controls the character of pleadings in set-off.[53]

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would have had to file a new suit with the result that all the parties, attorneys, judges, and so forth would have to consume more time, with greater resulting expense to the taxpayers. *Id.* In criticism of the result, Judge Stennis stated that, "[a]s long as trial courts are forced to operate under such backward rules, thus forcing jurors and witnesses to leave their homes and spend time in such useless repetitions, these forums cannot long retain the wholesome respect of the people." *Id.* The growing use of automobiles, with the resulting increase in accident suits, increasingly focused public attention on the problem. Daniel, *The Mississippi Counterclaim Statute*, 25 MISS. L.J. 252 (1954). The purpose behind the enactment of the counterclaim statute was to correct the obvious defects that existed in tort matters where cross-claims were involved. *Id.* at 253. In almost all cases where two people asserted claims against each other, two separate suits were required to settle the matters. *Id.* at 252. At the time of the article the Mississippi courts had not yet interpreted the statute. *Id.* at 253. It was predicted that the Mississippi statute would have its most novel application in the tort area where claims and counterclaims were presented. *Id.* at 257. Other states had already begun to consider causes of actions arising out of automobile accidents as being part of the same transaction. *Id.* at 257-58. In Brown v. Patterson, 214 Ala. 351, 108 So. 16, 17 (1927), plaintiff sued for assault and battery and defendant counterclaimed on the same basis. *Id.* The court held that two suits were not necessary to resolve the controversy since "[i]t is not in keeping with good practice to have two suits pending side by side . . . rehashing the same evidence on the merits of the cause." *Id. See generally* Schrader v. Neville, 34 Cal. 2d 112 (1949)(where causes arose out of same "transaction" found to include automobile accidents).

[52] Ward v. Mitchell, 216 Miss. 379, 384, 62 So. 2d 388, 390 (1953). The case involved an automobile collision where plaintiff's car was damaged to the extent of $750. *Id.* at 383, 62 So. 2d at 389. Defendant alleged that the accident occurred as the result of plaintiff's negligence and claimed damage to his own car. *Id.* Defendant attempted to present a plea of recoupment, but the court refused to allow the plea since the trial preceded the enactment of Chapter 249 of the Miss. Laws of 1952, which made counterclaims and recoupment available in tort actions. *Id.* at 384, 62 So. 2d at 390; *see* MISS. CODE ANN. § 1483.5 (1942) (predecessor to current counterclaim statute, MISS. CODE ANN. § 11-7-69 (1972)). Note that the distinctions between counterclaim, recoupment, and set-off are currently of little importance in the majority of states since most codes embrace set-off and recoupment in counterclaim. 20 AM. JUR. 2D *Counterclaim, Recoupment, and Setoff* § 6 (1965).

[53] Gerald v. Foster, 251 Miss. 63, 71, 168 So. 2d 518, 524 (1964). The respective state statutes control what may be pleaded as set-off. *Id.* However, actions involving counterclaims that did not arise out of the same transaction, situation, or subject matter did not fall under the realm of the statute. City of Oxford v. Spears, 228 Miss. 433, 440, 87 So. 2d 914, 916 (1956). In *City of Oxford*, plaintiff sued the city for dumping sewage into a stream which ran through his land. *Id.* at 438, 87 So. 2d at 915-16. The city attempted to counterclaim on grounds that the plaintiff was creating a health hazard by maintaining a hog lot. *Id.* The court held that MISS. CODE ANN. § 1483.5 (1942) of the Mississippi Code did not permit such a counterclaim since the counterclaim did not arise out of, and was

The Mississippi Supreme Court demonstrated the progress made toward settling tort matters in a single judgment in the case of *Richmond v. Van's Moving and Storage Co.*[54] In *Richmond*, the trial court entered separate verdicts for the two parties in an action involving personal injuries, but the trial court subsequently granted defendant's motion to correct the separate verdicts to a single judgment.[55] Plaintiff appealed stating that the verdicts should not have been reduced to a single judgment.[56] The Mississippi Supreme Court held that a single verdict should have been entered for defendant based on the Mississippi counterclaim statute[57] and affirmed the lower court's correction of the judgment in accordance with Miss. Code Ann. § 1670 (1956).[58]

A problem with set-off began to appear in various states when insurance companies insuring motorists attempted to assert set-off in actions involving comparative negligence.[59] In Florida, the issue

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unconnected with, plaintiff's action. *Id.* The Mississippi counterclaim statute permitted a defendant to recover in excess of the plaintiff's demand. Johnson v. Richardson, 234 Miss. 849, 860-61, 108 So. 2d 194, 199 (1959). *Johnson* involved cross actions growing out of an automobile collision where defendant recovered a $20,000 award. *Id.* at 854, 108 So. 2d at 196. The court disagreed with plaintiff's assertions that the counterclaim statute, § 1483.5, was inconsistent with the Mississippi comparative negligence statute. *Id.* at 856, 108 So. 2d at 199; *see also* Irby v. Citizens Nat'l Bank, 239 Miss. 64, 66-68, 121 So. 2d 118, 118-20 (1960) (when bank sued on note, court denied defendant's counterclaim based on wrongful business interference when bank told an out-of-state bank about his poor financial condition, since counterclaim did not relate to action on note).

[54] 197 So. 2d 235 (Miss. 1967).

[55] *Richmond*, 197 So. 2d at 236. Plaintiff was awarded $2,500 and defendant $3,250, creating a net amount due to defendant of $750. *Id.* Defendant made a motion to correct judgment based on MISS. CODE ANN. § 1670 (1942). *Id.* The statute provided in pertinent part that:

> [w]here, in the record or a judgment or decree of any court of law or equity, there shall be a mistake, miscalculation, or misrecital of any sum of money . . . it shall be the duty of the court, and of the judge thereof in vacation, to amend such judgment or decree.

MISS. CODE ANN. § 1670 (1956).

[56] *Richmond*, 197 So. 2d at 236. Plaintiff claimed that the mistake was judicial rather than clerical and, therefore, not covered under § 1670. *Id.* at 237. The court rejected the argument. *Id.* at 238.

[57] *Id.* at 237. The controlling statute for counterclaims at the time was MISS. CODE ANN. § 1483.5 (1942). *Id.*

[58] *See supra* note 55, at 236.

[59] Levy, *Pure Comparative Negligence: Set-Offs, Multiple Defendants and Loss Distribution*, 11 U.S.F. L. REV. 405, 412-13 (1977). When automobile accidents occur with fault spread between two parties, "tort principles and insurance contract law mandate that no set-off be permitted." *Id.* at 413. To allow insurance companies to assert set-off between two injured parties, who carry insurance for the very reason of avoiding liability, would thwart the very reason for carrying insurance in the first place. *Id.* For example, if

presented itself in the case of *Stuyvesant Ins. Co. v. Bournazian.*[60] In *Bournazian*, where both parties were insured, plaintiff sued for injuries sustained in an automobile accident and defendant counterclaimed for injuries.[61] The jury awarded damages to both sides, and the court set off the two verdicts, prompting the plaintiff to appeal.[62] The Florida Supreme Court held that set-off did not apply in cases where the parties were insured since such an application would reduce the contractual obligations of the insurance carrier.[63] The court emphasized that "set-off" had been used in earlier decisions in a non-technical sense, and that in comparative negligence cases, set-off simply served the "mechanical" purpose of forcing partial payment of amounts owed, as determined by the jury.[64] Furthermore, allowing the insurance companies to assert set-off would create a second level of comparative negligence reduction in the amount of recovery after the jury had already determined the first reduction.[65]

A suffered $10,000 in damages but was deemed 60% negligent and B suffered $5,000 but was 40% negligent, then the judgment would be that A should receive $4,000 from B's carrier and B should receive $3,000 from A's carrier. *Id.* at 412. If the insurance carriers were permitted to assert set-off, then A would only receive $1,000 of the award, creating a windfall for the carrier. *Id.* at 413; *see also* Digges & Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 MD. L. REV. 276, 292-93 (1982) (recommending that set-off not apply in cases when Maryland adopts comparative fault principles); Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Ass'n v. Superior Court, 30 HASTINGS L.J. 1464, 1470-71 (1979) (insurers should not be allowed to assert set-off to thwart purpose of liability insurance which is compensation of victim).

[60] 342 So. 2d 471 (Fla. 1977).

[61] *Bournazian*, 342 So. 2d at 471. Plaintiffs were awarded $10,000 and defendants were awarded $20,000 for their respective injuries. *Id.* at 472.

[62] *Id.* The court set off the two awards, producing a $10,000 net judgment for defendant. *Id.* The district court reversed the trial court and reinstated the separate verdicts to prevent the injustice of allowing the insurance companies to avoid their contractual liabilities. *Id.* at 472-74.

[63] *Id.* at 473. Plaintiff relied on the earlier Florida decision of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), which also involved separate judgments which the court off set to produce a single judgment. *Id.* at 439. The court in *Hoffman* noted that where a jury returned separate verdicts for a plaintiff and cross-complainant, a court should enter one judgment in favor of the party with the biggest verdict. *Id.*

[64] *Bournazian*, 342 So. 2d at 473. The court distinguished *Hoffman* by noting that the parties in *Hoffman* were not insured and that the *Hoffman* court used the term "set-off" nontechnically. *Id. See generally* CPS International, Inc. v. Harris & Westmoreland, 784 S.W.2d 538, 544 (Tex. 1990) (purpose of set-off was to adjust indebtedness and allow recovery only of balance due).

[65] *Bournazian*, 342 So. 2d at 473. Nothing in *Hoffman*, Florida's insurance laws, or public policy justified requiring a fully insured party to absorb a portion of the cost of his negligence and, accordingly, set-off or recoupment did not apply in the case of in-

A similar situation involving comparative negligence occurred in the case of *Jess v. Herrmann*.[66] In *Jess*, the California Supreme Court followed the reasoning in *Bournazian* in concluding that set-off should not be allowed in the case of insured parties.[67] According to the court, common sense dictated that courts not disregard the insurance coverage of the parties involved.[68] Furthermore, the court stated that set-off was designed simply to prevent the superfluous exchange of money, an accounting mechanism to avoid payment and repayment.[69] The court in *Bournazian* reasoned that in the case of insured parties, however, the concept did not serve its purpose, producing instead a reduction in the actual amount of recovery for both parties and creating a windfall for the insurance companies.[70] To allow set-off in such a situation would have served to violate considerations of public policy and fairness and, accordingly, set-off was not allowed.[71] In a dissenting opinion, Justice Manuel stated that disallowing set-off usurped the legisla-

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sured parties to create a windfall to insurance companies. *Id.* at 474; *see also* Sitzes v. Anchor Motor Freight, Inc., 169 W. Va. 698, 289 S.E.2d 679, 690-91 (1982) (no right of set-off in tort cases where parties were fully covered by liability insurance).

[66] 605 P.2d 208, 161 Cal. Rptr. 87 (1979).

[67] *Jess*, 605 P.2d at 208, 161 Cal. Rptr. at 87. The action arose out of an automobile accident where both plaintiffs and defendants sustained injuries. *Id.* at 209-10, 161 Cal. Rptr. at 89. The trial court found plaintiffs 40% negligent and defendants 60% negligent and netted the two judgments to produce a $54,000 amount due to plaintiff. *Id.* On appeal, however, the California Supreme Court, borrowing the reasoning of *Bournazian*, concluded that set-off should not apply in cases involving insured parties. *Id.*

[68] *Id.* at 88, 161 Cal. Rptr. at 209. Setting off the parties' independent claims against one another would fortuitously benefit the insurance companies while denying to the parties insurance proceeds for which they had paid premiums. *Id.*

[69] *Id.* at 90, 161 Cal. Rptr. at 211. Set-off, when parties were uninsured, could prevent unfair situations such as where one party, in a two-judgment situation, was insolvent and uninsured but owed the larger of the two verdicts. *Id.* Instead of forcing the solvent party to pay the insolvent party first and risk default by the insolvent party, who owed the larger verdict, the courts would enforce a set-off. *Id.*

[70] *Id.* In *Jess*, defendant owed plaintiff $60,000 and plaintiff owed defendant $5,600 after reduction for comparative negligence. *Id.* If the court had allowed the insurers to set off the two verdicts, they would have owed a total of $54,400 ($60,000 less $5,600) rather than $65,600 ($60,000 plus $5,600), creating for them a windfall of $11,200 ($65,600 less $54,400). *Id.*

[71] *Id.* at 91, 161 Cal. Rptr. at 212. With respect to public policy, California's financial responsibility law was designed to protect that growing group of persons who are tragically injured on the highways by the negligence of others. *Id.*; *accord* Sorensen v. Allred, 112 Cal. App. 3d 722, 169 Cal. Rptr. 441, 446 (1981) (set-off not to be applied in cases of insured parties); *see also* Federal Deposit Ins. Corp. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 701 F.2d 831, 836-37 (9th Cir. 1983) (set-off not permitted when it would contradict public policy or would be inequitable to do so), *cert. denied*, 464 U.S. 935 (1983).

ture by reading into the set-off statutes an exception that the legislature did not provide.[72] The dissent further asserted that the public policy argument offered by the majority was inaccurate in that the true public policy was the protection of parties from liability resulting from third party injuries rather than protection of the injured parties themselves.[73]

In the instant case, the Mississippi Supreme Court adopted the reasoning in *Bournazian* and *Jess*, which is that setting off judgments serves to diminish the contractual liability of the insurers of the parties, thereby creating a corresponding windfall in favor of the insurance companies.[74] Furthermore, such an application of set-off would create, in addition to the first level of comparative negligence recovery reduction as determined by the jury, an "unwarranted second level" of reduction in the amount of the recovery.[75] Such a second level would be "manifestly unjust" and violate public policy.[76] Accordingly, since application of the concept of setting off judgments to produce a single judgment, as provided in Miss. Code Ann. § 11-7-69 (1972), would serve to diminish the responsibilities of insurers to perform their contractual duties, then set-off will not be applicable to benefit the insur-

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[72] *Jess*, 604 P.2d at 215-16, 161 Cal. Rptr. at 96 (Manuel, J., dissenting). In dissenting, Justice Manuel stated that statutory history and common law principles for over 75 years required that set-off be applied in all situations of cross-claims for money. *Id.* at 216, 161 Cal. Rptr. at 96 (Manuel, J., dissenting).

[73] *Id.* at 220, 161 Cal. Rptr. at 100 (Manuel, J., dissenting). The majority did not allow set-off of the two awards after reduction for comparative negligence, stating that a windfall would accrue to the insurers in violation of public policy. *Id.* (Manuel, J., dissenting). Manuel reasoned that if the majority took the line of reasoning of "compensating the victim for his tort loss" to its logical conclusion, then no rationale would exist for reducing the amount of damages by comparative negligence in the first place. *Id.* (Manuel, J., dissenting). Manuel concluded that set-off should apply since the insurance company should only pay the insured's liability, not make any person whole who happens to be injured by the insured. *Id.* (Manuel, J., dissenting).

[74] Pham v. Welter, 542 So. 2d 884, 891-92 (Miss. 1989). The contractual obligations of plaintiff's insurer would be avoided since the amount that plaintiff's insurer owed to defendant, for plaintiff's negligence, would be "absorbed" by the amount that plaintiff, Welter, would collect from defendant for defendant's negligence. *Id.* at 891. As a result, the insurer would receive a windfall corresponding to the amount for which its insured was liable to the opposing party. *Id.* at 892.

[75] *Id.* at 891-92. An unjust result would occur if the court allowed set-off to benefit insurance companies, since the court would, in effect, allow the appropriation of an "asset of the insured" — the right to recover for the injuries he sustained. *Id.* at 892 (citing *Jess*, 604 P.2d at 208).

[76] *Pham*, 542 So. 2d at 891. Plaintiff argued that the counterclaim statute should not be blindly applied, and that state financial responsibility laws should prevent the insurance companies from avoiding their responsibilities. *Id.*

ers at the expense of their insureds.[77]

For reasons of fairness,[78] equity,[79] efficiency, justice,[80] and furtherance of public policy,[81] courts and legislatures have steadily increased the situations to which the doctrine of set-off applies.[82] The advent of comparative negligence[83] has created a situation where multiple judgments are increasingly common, thus necessitating the application of set-off in tort situations.[84] However, in the interests of fairness and equity, courts have now carved out a specific exception to the set-off doctrine in cases involving insured parties.[85] When a motorist purchases liability insurance, he does so in order to avoid liability and with the expectation that other motorists have also purchased insurance by which he will be compensated for injuries they may cause.[86] Allowing insurance companies to plead set-off to reduce the amount they must pay to a party would permit insurers to avoid their contractual obligations and liability, obligations which the insured has purchased through premium payments.[87] *Pham* presents a situation not previously addressed in Mississippi, as evidenced by the court's borrowed reasoning from the courts of Florida and California.[88] Courts have consistently held that insurance companies may not use set-off to create a windfall for themselves at the expense of the policyholders.[89] The reasoning appears very sound and equitable, and courts in other states have consistently refused to apply the set-off doctrine in situations involving insured parties.[90] In spite of the expansion of the situations to which set-off applies, the court in *Pham* has taken a necessary step to limit an expansiveness that would threaten the very sort of injustice that set-off is designed to prevent.[91]

G. Michael Massey

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[77] *Id.* In a situation where the parties were insured, set-off was not applicable to reduce the liabilities of insurance companies. *Id.*

[78] *See supra* notes 25, 69, and accompanying text.

[79] *See supra* notes 24, 25, and accompanying text.

[80] *See supra* notes 37, 41, and accompanying text.

[81] *See supra* notes 65, 71, and accompanying text.

[82] *See supra* notes 37, 42, and accompanying text.

[83] *See supra* note 44.

[84] *See supra* note 51.

[85] *See supra* notes 59, 65, 67, and accompanying text.

[86] *See supra* notes 59, 71.

[87] *See supra* notes 59, 68, 70.

[88] *See supra* notes 65, 67, 74, and accompanying text.

[89] *See supra* notes 65, 67, 68.

[90] *See supra* notes 59, 65, 68.

[91] *See supra* notes 59, 67, 71.

Freedom of Expression: Congressional Enactments Suppressing Free Expression Based on Content Are Impermissible

Appellant[1] appealed the dismissal of two flag burning prosecutions[2] of the appellees[3] to the United States Supreme Court pursuant to the Flag Protection Act of 1989.[4] The appeals were consolidated and heard together by the Supreme Court.[5] These prosecutions were based upon public flag burnings that violated the Act.[6] The appellant contended that the Act was constitutional because it did not specifically proscribe expressive conduct on the basis of the particular content of the message.[7] The appellees argued that the Act violated the first

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[1] Appellant was the United States. United States v. Eichman, 110 S. Ct. 2404 (1990).

[2] *Eichman*, 110 S. Ct. at 2406. These actions were United States District Court cases from the District of Columbia and the Western District of Washington. *Id.*

[3] *Id.* at 2404. The appellees in the first action were Shawn D. Eichman, David Gerald Blaylock, and Scott W. Taylor. *Id.* In the second action, the appellees were Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and David Allen Strong. *Id.*

[4] *Id.* at 2406. The Flag Protection Act of 1989 was an amendment of 18 U.S.C.A. § 700 (West Supp. 1990) [hereinafter the Act]. It provided in pertinent part:

> Section 2. (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled. Section 3. (d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
>
> (2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

Id.

[5] *Eichman*, 110 S. Ct. at 2406-07. Appellants in both cases asked the lower courts to dismiss charges because the Act violated the first amendment. *Id.* Both lower courts dismissed the charges. *Id.*

[6] *Id.* at 2406. In suit No. 89-1933, the appellees violated the Act because they knowingly set fire to United States flags while protesting government policy on the Capitol's steps. *Id.* In suit No. 89-1934, the appellees violated the Act by setting fire to flags in protest of the Act's passage. *Id.*

[7] *Id.* at 2408. The government also asserted an interest in protecting the physical integrity of the flag so as to protect the flag's identity as "the unique and unalloyed symbol of the Nation." *Id.*

amendment protection of free speech.[8] The federal district courts dismissed both actions, finding that the Act violated the first amendment.[9] On direct appeal,[10] the United States Supreme Court, *held*, affirmed.[11] Where the government has enacted a statute which criminally proscribes expressive conduct out of concern for its likely communicative impact, such a statute is in violation of the first amendment protection of free speech. *United States v. Eichman*, 110 S. Ct. 2404 (1990).

The conception of expressive conduct as protected by the first amendment was recognized as early as 1931.[12] In *Stromberg v. California*,[13] The United States Supreme Court overturned the conviction of a California woman who violated a statute[14] that prohibited the display of a red flag as a symbol of opposition to the government.[15] The conviction was overturned because the Court found the statute was overly vague and allowed punishment of persons exercising "the opportunity for free political discussion."[16] The Court reasoned that any statute

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[8] *Id.* at 2406. When stating the district courts' basis for dismissal the Court only referred to the argument that the Act violated the first amendment protection of free speech as the position of the appellees. *Id.*

[9] *Id.* This violation was based upon the determination that the conduct of the appellee was expressive. *Id.*

[10] *Id.* The direct appeal was provided by statute. 18 U.S.C.A. § 700(d) (West Supp. 1990).

[11] *Eichman*, 110 S. Ct. at 2406. Congress provided direct appeal so the Court could expeditiously settle the constitutionality of the Act. *Id.*

[12] M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 3.06 (1984). Nimmer provided an overview of the evolution of verbal and non-verbal communication as speech. *Id.*

[13] 283 U.S. 359 (1931).

[14] *Stromberg*, 283 U.S. at 369-70. This case came to the United States Supreme Court on appeal from the District Court of Appeals of California, Fourth Appellate District. *Id.* at 370. CAL. PENAL CODE § 403a, prohibited displaying a "red flag in a public place or in a meeting place as a sign, symbol, or emblem of opposition to organized government or "as an invitation or stimulus to anarchistic action or "as an aid to propaganda that is of a petitions character . . ." *Stromberg*, 283 U.S. at 361.

[15] *Stromberg*, 283 U.S. at 362. Appellant was a 19 year old woman who was a supervisor at a children's summer camp in the foothills of the San Bernardino mountains. *Id.* The charge arose from a daily ceremony in which appellant led the campers in raising a red flag that was a "camp made reproduction of the flag of Soviet Russia." *Id.* Appellant also led the campers in recitation of a pledge "to the worker's red flag . . . ." *Id.*

[16] *Id.* at 369. The Court noted that the verdict against appellant at trial was a general one, and was not based on any of the three specific provisions of the statute. *Id.* at 368-69. The Court affirmed the validity of the second and third provisions which prohibited incitements to violence and threats to overthrow the government. *Id.* The Court alluded that these two provisions did not apply to the appellant's conduct and turned its focus to the first clause of the statute which prohibited the display of the red flag "as a

which is so vague as to allow the punishment of political discussion runs counter to principles found in the Constitution's fourteenth amendment.[17] Thus, *Stromberg* was among the first in a logical progression leading to further protection of expressive conduct.[18]

A significant case in this logical progression was *United States v. O'Brien*.[19] This case involved the prosecution of an individual for burning his draft card in violation of a federal statute[20] that prohibited such activity.[21] The Supreme Court upheld the conviction and elaborated a standard for determining when the government may limit or restrict expressive conduct.[22] The standard established that a governmental regulation is "sufficiently justified if it furthers an important or

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sign, symbol or emblem of opposition to organized government." *Id.* at 369. The Court concluded that this first clause was repugnant to the principles of our constitutional system. *Id.*; *see* NAACP v. Button, 371 U.S. 415, 444 (1963)(only substantial regulatory interest could justify broad and vague statute that infringed first amendment rights); Hodsdon v. Buckson, 310 F. Supp. 528, 535 (D. Del. 1970)(overbreadth and vagueness result when legislature, having power to regulate certain conduct, strikes so bluntly as to proscribe constitutionally protected conduct as well); *see also* Thomas v. Collins, 323 U.S. 516, 531 (1940), *reh'g denied*, 323 U.S. 819 (1945)(rights of free speech are not confined to any field of human interest).

[17] *Stromberg*, 283 U.S. at 368. The statute was deemed invalid on its face. *Id.* at 368-69.

[18] J. Nowak, R. Rotunda & J. Young, Constitutional Law 988-96 (2d ed. 1983). Nowak, Rotunda, and Young provide a thorough discussion of this evolution of the protection of conduct as speech. *Id.*; *see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)(public school children could not be compelled to salute flag because student's refusal to salute was expressive conduct), overruling, Minersville School District v. Gobitis, 310 U.S. 586, 591 (1940), (Supreme Court upheld conviction of Jehovah's Witness who refused to salute flag).

[19] 391 U.S. 367, *reh'g denied* 393 U.S. 900 (1968).

[20] *O'Brien*, 391 U.S. at 369. This case came to the United States Supreme Court on Writ of Certiorari. *Id.* at 372.

[21] *Id.* at 370. The statute applied to any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes such certificate . . . ." *Id.* at 367 (citing 50 U.S.C. App. § 462(b)(3)(1965)). Respondent and three others burned their Selective Service registration certificates in front of the South Boston Courthouse in the presence of a sizeable crowd, including several FBI agents. *Id.* The FBI agents led O'Brien inside the Courthouse where O'Brien presented the charred remains of his draft card to the agents. *Id.* For this, O'Brien was convicted for violation of the federal statute. *Id.* at 370; *see also* Wayte v. United States, 470 U.S. 598, 614 (1985)(government's passive enforcement policy of Selective Service registration violators did not violate first or fifth amendments).

[22] *O'Brien*, 391 U.S. at 377. *O'Brien* was one of the few cases in which the Court explicitly delineated a "test." *Id. See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1482-1508 (1975)(providing thorough discussion of how *O'Brien* fit into symbolic speech analysis).

substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest."[23] The Supreme Court held that the federal statute under which O'Brien was convicted met this test, and it was therefore upheld.[24] The Court's opinion seemed heavily swayed by the express constitutional authority of Congress to raise and support armies and take any measures "necessary and proper" to that end.[25] The decision may not have been firmly grounded in first amendment jurisprudence.[26]

A further example of this conception of symbolic speech occurred in *Tinker v. Des Moines Independent Community School District*.[27] In *Tinker*, the petitioners were secondary school students who were suspended for wearing black armbands in protest of the Vietnam Conflict.[28] The Supreme Court upheld the right of students to wear the armbands.[29] This decision was premised on the notion that wearing the

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[23] Ely, *supra*, note 22, at 1483-84 (citing *O'Brien*, 391 U.S. at 377). Ely omitted the first step that required the regulation to be "within the constitutional power of the government," because this step "is superfluous in light of the most natural reading of . . . this particular criterion." *O'Brien*, 391 U.S. at 377.

[24] *O'Brien*, 391 U.S. at 382. The Court determined that the first part of its new standard requiring the constitutional power to act was met through the authority "to raise and support armies and to make all laws necessary to that end. . ." *Id.* at 377. The second part was fulfilled because the Selective Service certificate served a number of purposes that furthered important national interests. *Id.* at 381-82. The third part was met because the requirements of the statute were unrelated to the suppression of free expression. *Id.* at 382-83. The Court also determined that the fourth part of the test was met because the statute was sufficiently limited. *Id.* at 382.

[25] *Id.* at 378-81. The Court listed four governmental purposes that would be harmed by the destruction of draft cards. *Id.*

[26] *Id.* at 379. The Court has tended to yield to Congress in military matters, and this may well explain the decision. *Id.* at 377.

[27] 393 U.S. 503 (1969).

[28] *Tinker*, 393 U.S. at 504. It was highly relevant to the Court's decision that the school did not prohibit the wearing of all symbols. *Id.* at 510. Instead, school officials chose only to prohibit the wearing of black armbands in opposition to the Vietnam Conflict. *Id.* The Court concluded that the prohibition of one particular opinion was not constitutionally permissible unless it was necessary to avoid "material and substantial interference with schoolwork or discipline." *Id.* at 511.

[29] *Id.* at 514. The Court suggested that the problem was one of balancing the student's rights and the school's need for rules to maintain order. *Id.* at 507. The Court utilized the Fifth Circuit's standard in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966), which held that conduct may not be proscribed unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quoting *Burnside*, 363 F.2d at 749).

armbands was an action "closely akin to pure speech."[30] The Court reasoned that wearing the armbands was a part of personal intercommunication between students, and such communication, though symbolic, was protected under the first amendment free speech clause.[31] This recognition that symbolic speech is "closely akin to pure speech" was a logical step in the evolution of the Court's elaboration of what constitutes symbolic speech.[32]

The combination of speech and action was addressed in *Street v. New York*.[33] Here, the Court overturned a conviction of a New York man for "casting contempt" upon the American flag in violation of a New York state statute by verbally defiling and burning the flag.[34] The

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[30] *Tinker*, 393 U.S. at 505-06. This theme that conduct was closely akin to speech ran throughout cases dealing with freedom of expression. *Id.*; *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (National Park Service prohibition of camping in Lafayette Park and Mall upheld as permissible suppression of expressive conduct because regulation was content neutral). *But see* Wooley v. Maynard, 430 U.S. 705, 717 (1977)(prosecution of individual for scratching state motto off license plate was impermissible because state's interest in having motto displayed did not outweigh individual's right to not display motto).

[31] *Tinker*, 393 U.S. at 512. The Court refused to allow students' rights to be infringed upon once the students entered the school grounds. *Id.*

[32] *Id.* at 505-06. This case was well along in the development of this concept. *Id.*; *see also* James v. Board of Educ., 461 F.2d 566, 575 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)(school board could not discharge high school English teacher for wearing black armband in protest of Vietnam Conflict because his conduct was expressive in nature); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966)(first amendment rights not confined to verbal expression but embrace appropriate types of action which include right to protest in orderly manner); Cox v. Louisiana, 379 U.S. 559, 574, *reh'g denied*, 380 U.S. 926 (1965)(peaceful protest was form of speech); Edwards v. South Carolina, 372 U.S. 229, 237 (1963)(peaceful demonstration could not be prohibited). *See generally* Friedman, *Why Do You Speak That Way? - Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587, 587-601 (1988)(discussion of symbolic expression under first amendment and possible effect of judicial consideration of speaker's motivation); Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 1006-24 (1987)(factors involved in judicial evaluation of when government may restrict political dissent and proposal of model balancing test that considers all relevant factors).

[33] 394 U.S. 576 (1969).

[34] *Street*, 394 U.S. at 577-78. In reaction to the shooting of James Merideth, the appellant burned his own American flag on a New York street corner and declared, "We don't need no damn flag." *Id.* at 579. Appellant admitted it was his flag and that he burned it. *Id.* The statute provided that it was a misdemeanor "publicly [to] mutilate, deface, defile, or defy, tromp upon, or cast contempt upon either by words or act [any flag of the United States]." N.Y. PENAL LAW § 1425 (1909). In 1967, § 1425, subd. 16, was superceded by § 136 of the General Business Law, which in par. d defines the offenses in identical language. *Street*, 394 U.S. at 578 n.1. Note that the Court only addressed the "words" portion of the statute, finding it unnecessary to reach the "act" portion. *Id.* at 581.

United States Supreme Court balanced the state's interest in prohibiting the speech and action with the individual's right to expression.[35] The Court's opinion turned on whether the appellant's speech could be the basis for his conviction and if the state's interests were substantial enough to allow the suppression of expressive conduct.[36] The Court concluded that none of these interests could constitutionally justify the conviction of the appellant.[37] The state interest in preventing incitement and in preventing retaliation against appellant were inadequate bases upon which to convict because the combination of the words and the burning of the flag did not meet the fighting words test.[38] The con-

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[35] *Street*, 394 U.S. at 390-91. As noted in the text, none of these state interests were adequate to allow the punishment of appellant for his contemptuous words directed at the American flag, notwithstanding the fact that appellant simultaneously burned an American flag. *Id.* at 594. *But see* Iowa v. Farrell, 223 N.W.2d 370, 373 (Iowa 1974)(upheld state interest as adequate basis to punish flag desecration).

[36] *Street*, 394 U.S. at 590-91. The state interests set forth were the following:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

Id. at 591.

[37] *Id.* at 591. The Court emphatically stated that the ruling did not pass on the validity of the conviction based upon the act of flag burning alone. *Id.* at 585. Though not explicitly stated, the Court rejected the state's interests for reasons that indicate the statutory restriction was content-based. *Id.* The Court will not uphold statutes that allow for suppression of free speech based on content. *Id.* at 593. *See generally* Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 46-118 (1987)(in-depth discussion of modern content-based restrictions and Supreme Court's standards of evaluation of content neutral and content-based speech/expression prohibition statutes).

[38] *Street*, 394 U.S. at 591-92. Even if the state interest was allowed to stand, the statute was not drawn narrowly enough to prevent only fighting. *Id.* at 592; *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)(upheld statute narrowly drawn which prohibited words likely to cause breach of peace; standard established was whether or not men of common intelligence would understand words as likely to cause average addressee to fight); *see also* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)(power to regulate must be exercised so as not unduly to infringe protected freedom in attaining permissible state end); *cf.* Terminiello v. Chicago, 337 U.S. 1, 4, *reh'g denied*, 337 U.S. 934 (1949)(overturned prohibition of conduct which "stirs public to anger, invites dispute, brings about condition of unrest or creates disturbance"). *But cf.* Fiener v. New York, 340 U.S. 315, 321 (1951)(Court upheld breach of peace conviction based on petitioner's speech since police were under impression that violence might erupt). *See generally* Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 27-28 (1974)(broad discussion of first amendment protection of

viction also could not be based on the state's interest in preventing shock to passers-by because any shock caused by appellant's words coupled with the flag burning would have been owing "to the content of the ideas expressed."[39] Lastly, the Court determined that the state interest in demanding respect for our national symbol was wholly inadequate because such a requirement of respect infringed upon the individual's right to intellectual freedom.[40]

Even though the Supreme Court did not protect flag burning as symbolic speech in *Street*, this case surely foreshadowed further developments to come in this area. Among these further developments was *Spence v. Washington*.[41] In *Spence*, appellant was convicted for improper flag use under a Washington statute that prohibited the display of an American flag "to which is attached or superimposed figures, symbols, or other extraneous material."[42] The appellant hung an American flag from his window. The flag was upside down and had a "peace" symbol made of tape attached to both sides.[43] The Seattle police arrested appellant for this display which violated the Washington

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offensive language arguing that broad protection of such offensive language is necessary to protect dissenting viewpoints in our society). The appellant's words taken alone amounted only to excited public advocacy of an idea. *Street*, 394 U.S. at 591.

[39] *Street*, 394 U.S. at 592. Shocking effect of conduct has often been rejected by the Court as a reason to prohibit expressive conduct. *Id.*; *see* Cohen v. California, 403 U.S. 15, 18, *reh'g denied*, 404 U.S. 876 (1971)(language may not be proscribed merely because it is offensive to others); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988)("scurrilous" caricatures may not be prohibited based upon offensive nature).

[40] *Street*, 394 U.S. at 593. Note that these were similar reasons for which later decisions rejected the state interests asserted by the governmental entity. *Id.*

[41] 418 U.S. 405 (1974).

[42] *Spence*, 418 U.S. at 405. This action was appealed from the Washington Supreme Court to the United States Supreme Court. *Id.* at 405-06. The statute provided, in pertinent part, the following:

> No person shall, in any manner, for exhibition or display: (1) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard color, ensign or shield of the United States or of this state . . . or
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> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement. . . .

WASH. REV. CODE § 9.86.020 (1988).

[43] *Spence*, 418 U.S. at 406. Appellant was a college student who displayed the altered flag in protest of the United State's invasion of Cambodia and the violence at Kent State University. *Id.* at 408. His expressive purpose was to "associate the American flag with peace instead of war." *Id.*

statute.[44] The Supreme Court overturned appellant's conviction based upon its conclusion that his display of the flag was expressive conduct.[45] The Court engaged in a balancing of the state's possible interests[46] and those of the individual, as examined in *Street*.[47] However, in contrast to *Street* the Court directed this balancing test at the appellant's expressive conduct,[48] not his speech.[49] The Court rejected the common state interests asserted in other expressive conduct cases and protected the conduct because it was of such an expressive nature as to rise to the level of speech.[50]

This balancing between state and individual interests soon became

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[44] *Id.* at 406-07. Appellant violated both parts of the statute. *Id.* at 407; *see also* Long Island Vietnam Moratorium v. Cahn, 418 U.S. 906, 909 (1974), *aff'g* 437 F.2d 344 (2d Cir. 1970)(prohibited prosecution pursuant to New York flag desecration statute of any person displaying decal or button featuring peace sign against circular background of stars and stripes because statute was overbroad). *But see* Radich v. New York, 401 U.S. 531, 539 (1971)(conviction for display of flag in form of erect male sexual organ upheld because Court was equally divided).

[45] *Spence*, 418 U.S. at 415. The Court rejected an overbreadth analysis as proposed by appellant and instead rested its decision on the expressive nature of appellant's activity. *Id.* at 414 n.9; *see* State v. Kool, 212 N.W.2d 518, 518 (Iowa 1973)(recognizing communicative character of display of United States flag replica upside down with peace sign superimposed); *see also* United States v. Grace, 461 U.S. 171, 183 (1983)(federal statute prohibiting picketing of public side walks around Supreme Court building unconstitutional because statute restricted expression); *cf.* Smith v. Goguen, 415 U.S. 566, 578 (1974)(conviction pursuant to flag-misuse statute overturned because statutory language was indefinitely vague so as to allow excessively subjective treatment by prosecutorial authorities); Schacht v. United States, 398 U.S. 58, 61 (1970)(federal statute prohibiting actors use of military uniforms in negative portrayal of U.S. armed forces unconstitutional). *But see* Halter v. Nebraska, 205 U.S. 34, 45 (1907)(law prohibiting commercial use of flag upheld because speech involved was purely commercial and had no political value). *See generally* Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A.L. REV. 535, 546 (1989)(discussion of possible discriminatory enforcement resulting from overbroad or vague statutes; prevention of discriminatory enforcement of overbroad or vague statutes was primary concern of courts in considering statutes restricting free expression via conduct because such discriminatory enforcement would infringe upon first amendment protection).

[46] *Spence*, 418 U.S. at 415. Since all of the government interests were related to expression, the Court deemed the four step test of O'Brien v. United States, 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968), inapplicable. *Spence*, 418 U.S. at 414 n.8.

[47] *Spence*, 418 U.S. at 412 (citing Street v. New York, 394 U.S. 576, 590-94 (1969)). The Court rejected the same state interests stated in *Street*. *Id.*

[48] *Spence*, 418 U.S. at 415. The Court described appellant's flag display as expression that has a "protected character." *Id.*

[49] *Street*, 394 U.S. at 580. The Court's examination in *Street* was limited to appellant's speech. *Id.*

[50] *Spence*, 418 U.S. at 410-11. Due to the political climate, there was no ambiguity as to the meaning of the Spence's expressive conduct. *Id.*

standard practice for the Supreme Court. This can be seen in an extremely important case leading to further development of the protection of free expression, *Boos v. Barry*.[51] *Boos* overturned part of a District of Columbia statute that prohibited public protest of another government's policies, actions, et cetera within 500 feet of said government's embassy.[52] The Court held the portion of the statute pertaining to the "display of signs" to be unconstitutional, while the part pertaining to "congregating" was deemed constitutional as narrowly construed by the court of appeals.[53] The Supreme Court struck the display restriction because it was content-based. However, the Court allowed the "congregation" restriction of the statute because the passage only referred to dispersal of congregations directing speech at an embassy, and therefore only reached an insubstantial amount of constitutionally protected speech.[54] The most important aspect of the *Boos* opinion was the affirmation of strict scrutiny as the proper standard when reviewing content-based restriction on political speech in public forums.[55]

Texas v. Johnson[56] was the seminal case in development of flag burning as constitutionally protected expressive conduct.[57] In *Johnson*,

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[51] 485 U.S. 312 (1988).

[52] *Boos*, 485 U.S. at 316. The statute provided in pertinent part:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer of officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes . . . or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of said District.

D.C. CODE ANN. § 22-1115 (1981).

[53] *Boos*, 485 U.S. at 330-31. The display portion was found unconstitutional because it reached a substantial amount of constitutionally protected speech. *Id.* at 329.

[54] *Id.* at 331. This statute was site specific, preventing overbroad enforcement. *Id.*

[55] *Id.* at 321. According to the Court the display portion of the statute was too broadly drawn whereas the congregation portion was not. *Id.* at 312-13.

[56] 109 S. Ct. 2533 (1989).

[57] Faigman, *By What Authority?: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989*, 17 HASTINGS CONST. L.Q. 353, 355 (1990)(indicated that *Johnson* was among seminal cases in symbolic speech area and provided analysis of congressional power to pass the Flag Protection Act of 1989, arguing that Congress did not have such authority). *See generally*, Note, Texas v. Johnson: *Flag Desecration - A Look at Preserving the Flag as a Symbol of Nationhood and National Unity*, 21 U. WEST L.A.L. REV. 157, 172-76 (1990)(authored by Dorean J. Servati)(analysis of historical evolution of symbolic speech up to and including *Johnson*; concluded that *Johnson* deci-

the Court examined a flag desecration conviction obtained under a Texas statute.[58] The Court had to determine whether flag burning was expressive conduct and in doing so, weighed the respective state interests in prohibiting the conduct against the individual's rights.[59] Texas asserted two governmental interests in support of this conviction.[60] These interests were prevention of breaches of peace[61] and preservation of the symbolic character of the American flag.[62] The Court rejected these interests because the statute as designed tended to suppress expressive conduct based on its content.[63] The Court applied the

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sion followed logically from prior decisions concerning free expression); Note, *That "Burning" Flag Issue: Is It Finally Resolved in* Texas v. Johnson?, 16 OHIO N.U.L. REV. 103, 105 (1989)(authored by Martha Norton Mullins)(general discussion of *Johnson* and precedents leading thereto concluding that *Johnson* was proper by based upon precedent); Recent Developments, Texas v. Johnson: *The United States Supreme Court Reaffirms the Very Principles of Freedom for Which the American Flag Stands*, 64 TUL. L. REV. 265-70 (1989)(authored by C.L. Welborn)(general discussion of *Johnson*).

[58] *Johnson*, 109 S. Ct. at 2536-37. The statute provided in pertinent part:

> Desecration of a Venerated object (a) A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship; (3) a state or national flag. (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

TEX. PENAL CODE ANN. § 42.09(a)(3)(Vernon 1989).

[59] *Johnson*, 109 S. Ct. at 2538. The trial court convicted Johnson for the actual flag desecration and not for his words. *Id.* The Court first determined that Johnson's conduct was expressive, and then reasoned that the state's regulation was related to expression, thus placing this case outside of the test elaborated in United States v. O'Brien, 391 U.S. 367, 377 (1968). *Johnson*, 109 S. Ct. at 2538-40; *see also* Dallas v. Stranglin, 109 S. Ct. 1591, 1595-96 (1989)(government generally has freer hand in restricting expressive conduct than pure speech).

[60] *Johnson*, 109 S. Ct. at 2541. Texas elected not to assert all four interests as the state did in Street v. New York, 394 U.S. 576, 590 (1969).

[61] *Johnson*, 109 S. Ct. at 2541. These interests are common to all of the expressive conduct cases. *Id.*; *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(to prohibit expression leading to breach of peace, government must determine that expression was directed to incite or produce imminent lawless action and was likely to incite or produce such action).

[62] *Johnson*, 109 S. Ct. at 2541. Prevention of breaches of peace is not content-related while presentation of symbolic character is. *Id.* at 2542; *cf.* Carey v. Brown, 447 U.S. 455, 462-63 (1980)(government cannot prohibit expression purely on ground that it disagrees with message conveyed by expressive conduct); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)(debate on public issues should be uninhibited, robust, and wide open).

[63] *Johnson*, 109 S. Ct. at 2542. The Court has repeatedly refused to allow content-based statutes to stand based on state interests; *see also* Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45 (1983)(citing Carey v. Brown, 447 U.S. 455, 561

strict scrutiny standard to the Texas statute because the statute provided for a content-based restriction.[64] Since the Texas statute failed to meet this strict scrutiny standard, the Supreme Court rejected the State's arguments and overturned the conviction.[65] Thus, *Johnson* stood for the proposition that flag burning may be deemed expressive conduct in certain instances and, therefore, constitutionally protected.[66]

In the instant case, the United States Supreme Court found that because the Act reflected a government interest "related to the suppression of free expression" it violated the first amendment protection of free speech.[67] The majority stated that the precise language of the Act's prohibitions confirmed Congress's interest in the communicative impact of flag desecration so it necessarily followed that the Act did suppress expressive conduct for its likely communicative impact.[68] The Court further found that the Act must be subjected to "the most exacting scrutiny" because the restriction on expressive conduct cannot be "justified without reference to the context of the regulated speech."[69] The majority[70] concluded that the Act's restriction of expressive conduct did not meet the strict scrutiny standard. Therefore, the government's interest could not support the suppression allowed by the Act and the Act was declared unconstitutional.[71]

In his dissent, Justice Stevens argued that because the government had a legitimate interest in protecting the symbolic value of the flag, the government may prohibit certain methods of expressive conduct.[72]

(1980))(state must show that regulation proscribing expressive conduct serves compelling state interest and is narrowly drawn to achieve that end).

[64] *Johnson*, 109 S. Ct. at 2543. The Court concluded that the restriction was content-based. *Id.* at 2543.

[65] *Id.* at 2546. Justice Brennan described this refusal to uphold the Texas statute by saying, "We decline, therefore, to create an exception to the joust of principle protected by the First Amendment." *Id.*

[66] *Id.* The Court did rule out the possibility of a permissible flag desecration statute. *Id.* at 2547.

[67] *Eichman*, 110 S. Ct. at 2404-08. The Court applied a previously established standard. *Id.* at 2408.

[68] *Id.* The Court did not find the government's interest in preserving the flag's integrity to be a sufficiently compelling reason to proscribe the appellee's expressive conduct. *Id.*

[69] *Id.* at 2407. This refers to the strict scrutiny standard. *Id.*

[70] *Id.* at 2406. The majority consisted of Brennan, delivering the opinion joined by Marshall, Blackmon, Scalia, and Kennedy. *Id.*

[71] *Id.* The application of the strict scrutiny standard was based upon a previously established criteria. *Id.*

[72] *Eichman*, 110 S. Ct. at 2410 (Stevens, J., dissenting). The dissent consisted of

Further, the dissent contended the Act should have been upheld because the government should be allowed to protect the symbolic value of the flag without regard to the specific content of the flag burner's speech.[73] Justice Stevens further argued that the case was in fact a question of judgment as to whose interest weighed more heavily, the government's or the flag burner's.[74] The judgment of the dissenting justice was that the government's interest was significant enough to prohibit this specific mode of expressive conduct.[75]

While the five to four decision of the *Eichman* Court was very close, it appears that the Court made a decision extremely consistent with prior rulings.[76] The Court correctly applied the *Johnson* case in rendering its decision.[77] The federal statute struck down by *Eichman* was more narrowly drawn than the state statute in *Johnson*,[78] but "The Act" still suppressed content-based expression. For this reason, the Act failed to meet the *Johnson* standard that prohibits suppression "of expression out of concern for its communicative impact."[79] The primary significance of *Eichman* is that it overruled the Act and informed all legislators that statutory enactments that suppress expressive conduct to prevent expression of unpopular viewpoints will not pass constitutional muster.[80] While *Eichman* will not be very popular with the

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Stevens, delivering the opinion, joined by the Chief Justice, Justice White, and Justice O'Connor. *Id.* (Stevens, J., dissenting).

[73] *Id.* at 2401 (Stevens, J., dissenting). The dissent argued that it is well settled that some methods of expression may be prohibited. *Id.* (Stevens, J., dissenting). The prohibition is allowable if there is a legitimate societal interest unrelated to the suppression of the idea that the actor wishes to express. However, the prohibition must allow means other than that proscribed to be utilized in expressing an idea or the societal interest must be more important than allowing complete freedom of choice to the speaker. *Id.* (Stevens, J., dissenting).

[74] *Id.* (Stevens J., dissenting). The dissent asserted that the Court should consider whether the government's interest in preserving the value of the flag is unrelated to suppression of the ideas that flag burners attempt to express. *Id.* (Stevens, J., dissenting). Stevens argued that the possible messages are so varied that it is not possible to assess what type of speech the Act may wish to suppress. *Id.* at 2411 (Stevens, J., dissenting).

[75] *Id.* at 2412 (Stevens, J., dissenting). The argument that the government's interest was significant enough to allow the suppression of the flag burner's conduct relies on the assertion that the right to communicate ideas is not absolute. *Id.* (Stevens, J., dissenting). Since the right was not absolute and the government's interest was exceptionally strong, the dissent concluded that the suppression of the flag burner's conduct should have been allowed. *Id.* (Stevens, J., dissenting).

[76] *See supra* notes 62, 64 and accompanying text.

[77] *See supra* notes 47-57, 59 and accompanying text.

[78] *See supra* notes 4, 56 and accompanying text.

[79] *See supra* notes 51-60 and accompanying text.

[80] *See supra* notes 58-67 and accompanying text.

general public, it is a wise decision because it will prevent Congress from taking unauthorized action.[81] The Supreme Court should continue to prohibit any further Congressional action that may threaten first amendment protections.[82] There is little value to the type of expressive conduct displayed in *Johnson* and *Eichman*. However, the proscription of such conduct may only lead to further government intrusion on first amendment freedoms which would be detrimental to the exchange of ideas so important to our democratic society.[83]

J. Chase Bryan

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[81] *See supra* notes 53, 58 and accompanying text.
[82] *See supra* notes 53, 58 and accompanying text.
[83] *See supra* notes 42, 53, 58, 59 and accompanying text.

Constitutional Law—First Amendment—Free Exercise Clause—Expression of Cultural and Religious Heritage Is Not Grounds for Denial of Unemployment Compensation

Petitioners[1] appealed from a decision of the Circuit Court of Hinds County, reinstating respondent's[2] eligibility to receive unemployment benefits.[3] Petitioner dismissed respondent from employment[4] within the school district for refusing to comply[5] with dress code regulations.[6] In contravention of the dress code, respondent wore a religious[7] and cultural headdress.[8] A Mississippi Employment Security Commission referee denied[9] respondent unemployment benefits for her

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[1] Appellants were the Mississippi Employment Security Commission and Jackson Municipal Separate School District. Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324, 324 (Miss. 1990).

[2] *Id.* Appellee Deborah McGlothin was a member of the original African Hebrew Israelites out of Ethiopia and served as an assistant teacher in the Jackson Municipal Separate School District. *Id.* at 325.

[3] *Id.* at 327. The circuit court reinstated the appellee's eligibility to receive unemployment benefits after the appellant school district fired her and appellant commission denied unemployment benefits to appellee. *Id.*

[4] *Id.* Appellee was initially assigned to McLeod Elementary, where she worked for two years prior to requesting transfer to Whitfield Elementary. *Id.* at 325. Appellee was terminated from employment while performing her duties at Whitfield Elementary. *Id.*

[5] *Id.* Whitfield's principal, Kisiah Nolan, expressed displeasure with appellee's head wrap within the first year at Whitfield. *Id.* Appellee had previously worn the headdress at McLeod for two years without incident or reprimand. *Id.* The Whitfield school governance committee then convened and adopted a rule prohibiting the wearing of a headdress or blue jeans. *Id.* at 325-26. Appellee initially complied for fear of losing her job. *Id.* at 326. After attending a school sponsored multicultural workshop, appellee wore the headdress again. *Id.* McGlothin stated that multicultural diversity was acceptable and supported by the school system in the workshop, and she thereafter wore the garment, believing the district's position was to be more receptive to these items. *Id.*

[6] *McGlothin*, 556 So. 2d at 325. The local school governance committee, which was composed of employees and others in the school environment, promulgated the dress code. *Id.* at 326 n.1. District Personnel Director George Terry could not say whether the action of the committee was directed at the appellee. *Id.*

[7] *Id.* at 325. McGlothin wore berets and headdresses expressive of her religious and cultural heritage in the faith of the African Hebrew Israelites out of Ethiopia. *Id.*

[8] *Id.* McGlothin wore the items "especially during times of spiritual growth" as a personal preference which gave her strength in accordance with her teachings of religion. *Id.*

[9] *Id.* at 327. The referee denied the benefits because appellee wore headdresses as an expression of her religious and cultural heritage where it was not dictated by the Ethiopian religious culture. *Id.* Additionally, the referee based his decision on the fact that she

alleged misconduct.[10] The Employment Security Commission Board of Review affirmed the referee's ruling.[11] The circuit court reversed the decision of the board.[12] On appeal, the Mississippi Supreme Court, *held*, affirmed.[13] State unemployment benefits under the Mississippi Employment Security Law may not be denied where an employee is dismissed for an expression of cultural and religious heritage. *Mississippi Employment Security Commission v. McGlothin*, 556 So. 2d 324, 329 (Miss. 1990).

The United States Constitution guarantees the explicit protection of an individual's free exercise of religion, which extends to both religious beliefs and religiously motivated expression.[14] The United States Supreme Court's early view of free exercise focused on the "belief"-"action" distinction, which originated in the first major free exercise case, *Reynolds v. United States*.[15] The Mormon petitioner in *Reynolds* claimed polygamy was his affirmative religious duty, even though federal law prohibited such conduct.[16] Chief Justice Waite of the Supreme Court interpreted the first amendment as depriving the government of

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was selective in wearing the head wrap and continued to do so even after being warned. *Id.*

[10] *Id.* MISS. CODE ANN. § 71-5-513(A) (1972) defined "misconduct" and the Mississippi Employment Security Commission's referee paraphrased the word to mean: "[A]n act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, as disregard of the standard of behavior which an employer has the right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest . . . ." *McGlothin*, 556 So. 2d at 332-33 (Lee, P.J., dissenting).

[11] *McGlothin*, 556 So. 2d at 327. The board adopted the facts as found by the referee and affirmed his decision. *Id.*

[12] *Id.* The circuit court reversed the board's affirmation on the grounds that appellee's conduct was protected under the first amendment free exercise clause. *Id.* The circuit court also found that both the fact appellee did not wear the headdress all the time and that the wearing of such was not mandated by her religion did not detract from the protection of the first amendment. *Id.* Therefore, the trial court concluded that such conduct could not be construed as misconduct within the meaning of the statute. *Id.*

[13] *Id.* at 331. The majority acknowledged the validity of first amendment free exercise of religion and stated that the clause protected the appellee's conduct. *Id.*

[14] *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (any punishment for religious belief prohibited); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (state may not regulate individual's conscience, religious belief, or membership in religious organization).

[15] 98 U.S. 145 (1878).

[16] *Reynolds*, 98 U.S. at 161. The Court noted that at the trial level, petitioner proved that he was a member in the Church of Jesus Christ of Latter-Day Saints and a believer in its religious teaching. *Id.* Polygamy is a well documented part of Mormon teachings and scripture as an affirmative duty of the male Mormon to escape damnation in the hereafter. *Id.*

legislative power over mere opinion,[17] while allowing the power to reach actions violative of social duties and good order.[18] After noting the traditional condemnation of polygamy, the Court sustained the application of federal law.[19] The Court analogized that the allowing of polygamy in the face of a law banning bigamy would raise religious doctrines above the law, effectively permitting every citizen to decide what laws will apply to himself.[20] The Court later adopted a more modern view[21] requiring the government to satisfy the burden of strict scrutiny analysis and first applied the new view to a free exercise case in *Sherbert v. Verner*.[22] In *Sherbert*, the appellant was a member of the Seventh-Day Adventist Church, whose teachings forbade working on Saturday, the Sabbath day of its faith.[23] After refusing to work on

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[17] *Id.* at 162. The Supreme Court duly noted the initial point of inquiry: What exactly was the religious freedom guaranteed in the Constitution? *Id.* The majority also pointed out that a dangerous fallacy existed when the civil government was allowed to interfere in the religious opinions of men, as evidenced in colonial times. *Id.* at 162, 764; *see* Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977) (removal of child custody rights based on mother's religious belief in snake handling was violation of free exercise of religion); *see, e.g.*, Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 312 (constitutional inclusion of free exercise clause was due to recurring religious persecution).

[18] *Reynolds*, 98 U.S. at 162. The Court approved govermental imposition on religion when principles became overt acts breaching peace and good order. *Id.* at 163; *see* Minersville School Dist. v. Gobitis, 310 U.S. 586, 588-89 (1940) (court rejected free exercise claim in conflict between flag salute requirement and religion).

[19] *Reynolds*, 98 U.S. at 164. The Supreme Court pointed to the non-existance of polygamy in the Western world and condemned it as an offense against society over which the civil courts have cognizance to punish. *Id.* at 165. The evidence clearly led the Court to conclude that interpreting the constitutional provision protecting freedom of religion to include polygamy was impossible. *Id.*

[20] *Id.* at 167. The Court stated that allowing religion to be superior to the law would result in the government existing only in name with no power to control its citizens. *Id.*; *see* King v. City of Clarksdale, 186 So. 2d 228, 230 (Miss. 1966) (ordinance that conferred unbridled discretion to official over public exercise of free expression was unconstitutional).

[21] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 628 (1943) (changed focus of conflict between flag salute requirement and religion from freedom of religion to freedom of expression). For years after *Reynolds*, the court gradually shifted parameters of what was protected under the religious free exercise clause to a broader reading, protecting more forms of religion than *Reynolds* would. *See id.* at 625-27; *see also* Gillette v. United States, 401 U.S. 437, 439 (1971) (religious objection to certain wars, but not to all wars, afforded no grounds for exemption from participation).

[22] 374 U.S. 398 (1963).

[23] *Sherbert*, 374 U.S. at 399. The South Carolina textile mill changed the work week to include Saturday two years after the appellant's religious conversion. *Id.* at 399 n.1. At no time was the sincerity of appellant's religious beliefs challenged. *Id.*

Saturdays, which resulted in her dismissal,[24] appellant subsequently filed a claim for unemployment compensation benefits.[25] The South Carolina Supreme Court held[26] that appellant was not placed in a category exempt from disqualification because the statute neither directly infringed upon the appellant's freedom of religion nor prevented her in the exercise of her freedom to observe religious beliefs.[27] On appeal, the United States Supreme Court reversed and held that the disqualification for benefits imposed a burden on the free exercise of religion.[28] The Court stated that the agency's ruling forced appellant to choose between following her religion and forfeiting benefits and directly penalized her Saturday worship.[29] Additionally, the Court determined

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[24] *Id.* at 399. Subsequent to her discharge appellant sought similar work at area mills but found none which would afford her the opportunity to observe her Saturday religious convictions. *Id.* at 399 n.1.

[25] *Id.* at 399-400. The South Carolina court summarized the relevant unemployment compensation laws to read: "[T]o be eligible for benefits, a claimant must be able to work . . . available for work; and, further, that a claimant is ineligible for benefits if . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." *Id.* at 400 & n.3 (paraphrasing 68 S.C. CODE § 68-1 to 68-404).

[26] *Sherbert*, 374 U.S. at 401. The appellee Employment Security Commission denied the claim for benefits finding that appellant's restriction on employment brought her within the provision disqualifying her for benefits. *Id.* The trial court sustained the denial of benefits and the South Carolina Supreme Court affirmed that decision. *Id.*

[27] *Id.* The United States Supreme Court noted that unavailability for work for some "personal reasons" was held to be a basis of disqualification for benefits. *Id.* at 401 n.4. Furthermore, the Court stated that where the consequences of the disqualification directly affect first amendment rights, every "personal reason" could not be a basis for legitimate disqualification. *Id.*; *see* Employment Div. v. Smith, 485 U.S. 660, 669-674 (1988) (discussion of what constitutes legitimacy in claims of religious free exercise); Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52, 57-58 (Iowa 1983) ("fighting words" were misconduct under unemployment compensation statute); Melody Manor, Inc. v. McLeod, 511 So. 2d 1383, 1385 (Miss. 1987) (employee's resignation because of economically unfeasible continuance excluded employee's receipt of benefits). *See generally* Note, *Constitution - Freedom of Religion - Religious Belief Protected Under Free Exercise Clause Though Not Shown to Be Derived from Cardinal Tenets of Common Faith*, 22 SANTA CLARA L. REV. 235, 235-45 (1982) (authored by Jeffrey H. Wong) (personal religious convictions not common to majority of faith).

[28] *Sherbert*, 374 U.S. at 403-04. The Court noted that there was no difference between an indirect imposition on free expression of religion and that which is direct. *Id.* at 404. "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as only being indirect." *Id.* (quoting Braunfield v. Brown, 366 U.S. 599, 607 (1961)).

[29] *Sherbert*, 374 U.S. at 404. The Court found it readily apparent that appellant's declared ineligibility for benefits centered around the practice of her religion and was unmistakable pressure on her to forgo that practice. *Id.*

that while the state was under no obligation to afford such an exemption,[30] conditioning availability of benefits upon the willingness of an appellant to violate a religious principle effectively penalized the free exercise of her constitutional liberties.[31] The Court then stated that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of free expression.[32] Upon finding no such compelling interest, the Court held that the state could not constitutionally constrain a worker to abandon religious convictions when applying eligibility provisions.[33]

The Supreme Court adopted the standard of *Sherbert*, and did not seriously re-examine the doctrine announced until *Thomas v. Review Board of Indiana Employment Security Division*.[34] In *Thomas*, the focus was also on the free exercise clause in conjunction with a belief, but the issue centered around the type of belief.[35] Claimant as-

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[30] *Id.* The majority indicated that the state court's construction of the statute interpreting the benefit as a privilege and not a right would not save the statute from constitutional deficiency. *Id.*; *see* Flemming v. Nestor, 363 U.S. 603, 611 (1960) (interest of social security covered employee sufficient for due process protection); Speiser v. Randall, 357 U.S. 513, 529 (1958) (condition limiting availability of tax exemption unconstitutional); American Communications Ass'n v. Douds, 339 U.S. 382, 390 (1950) (employer's requirements of "non-communist" affidavits were constitutional).

[31] *Sherbert*, 374 U.S. at 406. The Court pointed out that even a gratuitous benefit conditioned on such a qualification discouraged the exercise of first amendment rights. *Id.* at 405-06 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[32] *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see* E.E.O.C. v. Fremont Christian School, 781 F.2d 1362, 1368-69 (9th Cir. 1986) (minimal interference with religious belief under compelling state interest is constitutional); Parks v. Employment Sec. Comm'n, 427 Mich. 224, 398 N.W.2d 275, 283 (1986) (requirement that school district employee pay union dues did not affect former employee's first amendment interest; therefore, denial of benefits was constitutional); *see also* Note, *Free Exercise and Dress Codes: Toward More Consistent Protection of a Fundamental Right*, 63 IND. L.J. 601, 609-20 (1987-88) (authored by Dale E. Carpenter) (citing application and misapplication of strict scrutiny to free exercise dress code cases); Note, *Constitutional Law - Unemployment Compensation Benefits and the First Amendment - Perpetuating the Tension?*, 6 W. NEW ENG. L. REV. 1131, 1141-46 (1984) (authored by Mark D. Vasington) (focusing on need for alternative analysis in establishing constitutional protection to free exercise of religion).

[33] *Sherbert*, 374 U.S. at 409. The Court explained that its holding did not foster the "establishment" of this particular religion; the holding merely applied a neutral hand "in the face of religious differences." *Id.*; *cf.* Lemon v. Kurtzman, 403 U.S. 602, 620-22 (1971) (restrictions were necessary to ensure that teachers play strictly non-ideological role).

[34] 450 U.S. 707 (1981).

[35] *Thomas*, 450 U.S. at 709. The nature of the claimant's belief was that, as a Jehovah's Witness, he could not participate in the production of armaments. *Id.*; *see* Comment, Thomas v. Review Board of Indiana Employment Security Division: *Denying Freedom of Religion in Unemployment Compensation Cases*, 9 N.Y.U. REV. L. & SOC.

serted a conscientious objection to the nature of his employment loosely supported by religious beliefs.[36] Moreover, as the Indiana Supreme Court found in its denial of benefits, claimant's objection to his employment was based on neither a cardinal religious tenet nor even a uniform belief among Jehovah's Witnesses.[37] The Supreme Court of the United States considered the validity of Thomas's beliefs unnecessary and focused instead on the constitutional parameters of the case.[38] The Court concluded inquiry into his beliefs by stating that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit first amendment protection."[39] The majority determined the narrow function of the reviewing court to be whether

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CHANGE 371, 377-91 (1979-80) (authored by Wayne H. Thompson) (differentiating between religious beliefs and personally professed beliefs); Note, *Constitutional Law: The Religion Clauses - A Free Rein to Free Exercise?*, 11 STETSON L. REV. 386, 388-93 (1982) (authored by G. Robertson Dilg) (examining religious clauses as applied to *Thomas*).

[36] *Thomas*, 450 U.S. at 710-11. Claimant was hired to work in the roll foundry area of the company at which time he informed his employer of his particular faith. *Id.* at 710. After one year, that department was closed and claimant was transferred to the turret department where he worked directly on tanks. *Id.* After realizing that the work was weapons related, claimant unsuccessfully looked for an in-house transfer. *Id.* Claimant asked for a layoff, at which time he sought unemployment compensation. *Id.*

[37] *Id.* at 715. Before asking for the layoff, Thomas consulted a fellow Jehovah's Witness who advised him that working on weapons was not "unscriptural." *Id.* at 711. After advisement, Thomas determined that his friend's interpretation was less strict than his own, and thus personally unacceptable. *Id.* Based on the foregoing information, the state court concluded that claimant had quit voluntarily for personal reasons which disqualified him for benefits. *Id.* at 713.

[38] *Id.* at 716. The Supreme Court resolved the entanglement of the establishment clause and the free exercise clause by stating that the denial of benefits violated Thomas's free exercise of religion, and payment of those benefits would not violate the establishment clause. *Id.* at 717-18; *cf.* Cooper v. Eugene School Dist., 301 Or. 358, 723 P.2d 298, 308-11 (1986), *appeal dismissed*, 480 U.S. 942 (1987) (implementing neutral policy concerning religion in public schools facilitates protection of free exercise).

[39] *Thomas*, 450 U.S. at 714. Justice Burger denied inquiry into Thomas's beliefs, stating, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. The line separated Thomas's refusal to work directly on weapons and his willingness to work in a non-armament area of the same factory. *Id.*; *see* Keith v. Chrysler Corp., 41 Mich. App. 708, 200 N.W.2d 764, 766-67 (1972) (refusal of offer of suitable employment proper grounds for denial of unemployment benefits). *See generally* Note, *Constitutional Law - Freedom of Religion - State's Denial of Unemployment Benefits to Jehovah's Witness Who Quit Armaments Production Job for Religious Reasons Violates First Amendment's Free Exercise Clause*, 59 U. DET. J. URB. L. 217, 219-25 (1982) (authored by Robert R. Florka) (in-depth analysis of *Thomas*); Note, *Unemployment Benefits and the Religion Clauses: A Recurring Conflict*, 36 U. MIAMI L. REV. 585, 591-97 (1982) (authored by Diane Deighton Ferraro) (examining *Thomas* on conflicting establishment clause and free exercise of religion clause).

an appropriate finding existed that petitioner "honestly believed that such work was forbidden by his religion."[40] Since the Court found that the appropriate findings were established at the hearing level, then the state must give the claimant unemployment benefits to avoid first amendment violation, unless a compelling state interest existed.[41] After examining two interests averred by the state, the Court concluded that even the combined interests did not outweigh the adverse effect of denial on the free exercise of religion.[42] Therefore, the Court determined that unemployment benefits must be awarded in light of the *Sherbert* doctrine.[43]

Five years later, the Court limited the scope of the preceeding cases in *Bowen v. Roy*.[44] Upon the appellees' refusal to recognize the social security number assignment in accordance with their Native American beliefs,[45] the Pennsylvania Department of Public Welfare terminated health and medical benefits and filed suit to diminish appellees' food stamp allowance.[46] On appeal,[47] the United States Su-

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[40] *Thomas*, 450 U.S. at 716. The majority agreed that however difficult the trial court's findings of fact were, the Supreme Court must confine their conclusions to the facts as found below. *Id.*; *see* Mississippi Unemployment Compensation Comm'n v. Avent, 192 Miss. 85, 87, 4 So. 2d 296, 297 (1941) (findings of fact by board of review were conclusive on appeal if amply supported).

[41] *Thomas*, 450 U.S. at 716. The Court pointed out that if the benefits were denied, Indiana would be compelling Thomas to trade the exercise of one of his first amendment rights with unemployment benefits. *Id.* at 718. *See* Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986) (first amendment does not require military to accommodate religious practices that detract from uniformity); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 269 Ind. 361, 380 N.E.2d 1225, 1227-30 (1978) (state's photograph requirement for driver's license not compelling enough to override religious freedom).

[42] *Thomas*, 450 U.S. at 718-19. The state's unsuccessful objections were (1) compensation awards for unrestricted personal beliefs would place a severe burden on the state, and (2) the denial of benefits in such cases would forgo the employer's burden of conducting a detailed inquiry into job applicant's religious beliefs. *Id.*

[43] *Id.* at 720. Justice Berger reasoned that "[u]nless we are prepared to overrule *Sherbert* . . . Thomas cannot be denied the benefits due him on the basis of the findings of the referee . . . that he terminated his employment because of his religious convictions." *Id.*

[44] 476 U.S. 693 (1986).

[45] *Roy*, 476 U.S. at 695. Appellees contended that obtaining a social security number for their two year old daughter would violate their religious beliefs. *Id.* Roy testified that, after his first child, he developed a religious objection to obtaining a social security number, and he testified at trial concerning the "evil" that would flow simply from obtaining a number. *Id.* at 696-97, 697 n.3. Roy testified, after learning that a number had already been assigned, that the use of such a number would rob his daughter, Little Bird of the Snow, of her spirit. *Id.* at 697.

[46] *Id.* at 695. Participants in these programs are required "to furnish their state welfare agencies with the social security numbers of members of their households as a

preme Court held constitutional the state requirement that individuals possess social security numbers for obtaining benefits, despite the claimants' religious belief that the number would impair the child's spirit.[48] The Court applied minimal scrutiny in ruling that the government had met its burden by demonstrating that the requirement was neutral and uniform in its application, and that the requirement was reasonable in promoting a legitimate public interest.[49] By reasoning that the statute failed to provide a "mechanism for individual exemptions," the Court held that the requirement exhibited no "hostility towards religion."[50] In conclusion, the majority noted that while the free exercise clause protected an individual from certain governmental im-

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condition of receiving benefits." *Id.*; *see* 42 U.S.C. § 602(a)(25) (1990) (required exchange of certain information for verification of eligibility).

[47] *Roy*, 476 U.S. at 696. The appellees filed a claim in district court claiming that denial of the food stamp allowance abridged their free exercise of religion, and the first amendment entitled them to an exemption from the disqualification of these benefits. *Id.* The trial judge made a suggestion that the child be awarded a social security number which phonetically coincided with her name, but Roy refused on religious grounds and stated his dissatisfaction in even appending her full tribal name to her social security number. *Id.* The trial court denied Roy's request for damages and awarding injunctive relief, so that use of a social security number for Little Bird of the Snow was not required. *Id.* at 697-98.

[48] *Id.* at 706-07. The court stated that the first amendment had never required the state to behave in such a manner as to further the spiritual growth of an individual or his family. *Id.* at 699. The court reasoned that the government cannot be required to conduct its own internal affairs in compliance with an individual's religious beliefs, "just as the government may not insist that appellees" observe any set form of religion. *Id.* at 699-700. *But see In re* Brown, 478 So. 2d 1033, 1038-39 (Miss. 1985) (free exercise clause prohibits state interference in certain religiously motivated conduct); *cf.* Munford, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 56 MISS. L.J. 73, 96-97 (1986) (application of article I section 18 to religious free exercise cases in Mississippi).

[49] *Roy*, 476 U.S. at 707-08. The *Roy* Court acknowledged that the statute may confront some applicants for benefits with choices, but the court held that it did not affirmatively compel appellees to refrain from religiously motivated conduct. *Id.*; *cf.* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (constitutional protection extends to public advocation of religion); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (regulation imposed to insure public safety and convenience did not violate constitutional rights); Pierce v. Society of Sisters, 268 U.S. 510, 517-18 (1925) (parents compelled to send children to school); Sheink v. Maine Dep't of Manpower Affairs, 423 A.2d 519, 522 (Me. 1980) (violation of employer's rule is not per se misconduct under employment security law); Vander Laan v. Mulder, 178 Mich. App. 172, 443 N.W.2d 491, 493-95 (1989) (denial of unemployment compensation to employee who "shared her faith" with patients was not violation of first amendment free exercise).

[50] *Roy*, 476 U.S. at 708. The Court noted the "good cause" standard in *Thomas* and *Sherbert* created a mechanism for individualized exemptions, and found that such a mechanism did not exist in *Roy*. *Id.*

positions, the clause did not give an individual the authorization to impose on internal governmental procedure.[51] *Hobbie v. Unemployment Appeals Commission*[52] resolved the conflict surrounding circumstances where employers made no changes in working conditions, but the employee's newly changed religious beliefs prohibited compliance with formerly acceptable conditions.[53] In *Hobbie*, the employee notified her employer that her change in faith to Seventh Day Adventist would forbid her working on Saturday.[54] Upon her refusal to work and her subsequent termination,[55] Hobbie unsuccessfully applied for unemployment compensation.[56] On appeal, the Supreme Court abandoned the minimal scrutiny applied in *Roy* in favor of the earlier test of strict scrutiny.[57] The Court, in effectively destroying the distinction of *Roy*,

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[51] *Id.* at 700. The Court recognized the government's need to have certain space within which to operate, even where incidental neutral restrictions must be used. *Id.* at 712; *see* Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1035-36 (7th Cir. 1982) (Orthodox Jewish basketball players had no constitutional right to wear insecurely fastened yarmulkes during game); *see also* Note, *A New Standard of Review in Free Exercise Cases*: Thomas v. Review Bd. of the Indiana Employment and Sec. Civ., 10 PEPPERDINE L. REV. 791, 793-807 (1983) (authored by Lynn M. Gardner) (examining strict scrutiny and its application in religious free exercise cases).

[52] 480 U.S. 136 (1987).

[53] *Hobbie*, 480 U.S. at 143; *see* Engraff v. Industrial Comm'n, 678 P.2d 564, 568 (Colo. Ct. App. 1983) (timing of employee's conversion is not primary consideration). *Compare* Hildebrand v. Unemployment Ins. App. Bd., 19 Cal.3d 765, 566 P.2d 1297, 1299-1301 (1977) (denying full unemployment compensation upon refusal to work on Sabbath), *cert. denied*, 434 U.S. 1068 (1978), *and* Martinez v. Industrial Comm'n, 618 P.2d 738, 741 (Colo. App. 1980) (denying compensation to America Indian after adoption of religious beliefs in conflict with work), *with* Key State Bank v. Adams, 138 Mich. App. 607, 360 N.W.2d 909, 913 (1984) (upholding benefits to employee after discharge for refusal to work on Saturday). *See generally* Note, *The Free Exercise Clause and Unemployment Compensation for Religious Converts*, 33 WAYNE L. REV. 159, 159-70 (1986) (authored by Patrick A. Karbowski) (conflict among states concerning benefits where employer made no condition changes).

[54] *Hobbie*, 480 U.S. at 138. The employee's supervisors devised a suitable arrangement in which claimant did not have to work on Saturday; this arrangement continued until the general manager terminated the arrangement. *Id.*

[55] *Id.* Before termination, Hobbie met with her minister to determine the true religious nature of the Saturday restriction imposed by her faith. *Id.* This time she confirmed her belief and discontinued Saturday work. *Id.*

[56] *Id.* at 139. The claims examiner for the Bureau of Unemployment Compensation denied compensation according to the premise that under Florida law, the benefits were available to persons "who become unemployed through no fault of their own." *Id.* at 138-39.

[57] *Id.* at 141. The Court stated that there was no meaningful distinction between *Sherbert* and *Hobbie*, and the Court held that the strict scrutiny of *Sherbert* must apply. *Id. See generally* Comment, *Constitutional Law - Denial of Unemployment Compensa-*

broadened prior holdings by extending first amendment protection to employees whose changed religious convictions made their work incompatible.[58] The *Hobbie* decision, however, left open the question of what state interests would be compelling enough to override a legitimate claim to the free exercise of religion.[59]

The Supreme Court narrowed what is sufficient to constitute a compelling interest in *Frazee v. Illinois Department of Employment Security*.[60] The appellant in *Frazee* refused to accept a job position offered to him by a temporary job service, and this refusal gave rise to a denial of unemployment benefits.[61] The state court determined that the Sabbatarian reason for refusal did not constitute good cause for exemption from disqualification[62] because appellant did not belong to an established religious sect, nor were his beliefs that of an established religious body.[63] On appeal, the Supreme Court reversed and remanded, rejecting the idea that one must respond to the dictates of a religious organization in order to claim first amendment protection.[64]

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tion to Religious Converts Violates the First Amendment 22 SUFFOLK U.L. REV. 153, 153-58 (1988) (authored by Patricia Connors) (analyzing *Hobbie* and free exercise of religion).

[58] *Hobbie*, 480 U.S. at 141. The commission urged the Court to apply the "reasonable means" scrutiny of *Roy*, but the Court flatly rejected both that theory and the holding in *Roy*. *Id.* at 141, 142 n.7. *But cf.* Flynn v. Maine Employment Sec. Comm'n, 448 A.2d 905, 908-09 (Me. 1982) (no violation of free exercise clause when employee knowingly accepted religiously conflicting job), *cert. denied*, 459 U.S. 1114 (1983); Levold v. Employment Sec. Dep't, 24 Wash. App. 472, 604 P.2d 175, 177 (1979) (infringement of religious freedom was self-imposed where employee "voluntarily accepted employment conflicting with religious beliefs").

[59] *Hobbie*, 480 U.S. at 142. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[60] 489 U.S. 829 (1989).

[61] *Frazee*, 489 U.S. at 830. Frazee told his employer after refusing the job that his religion would not allow him to work on Sunday. *Id.* Frazee asserted his Christianity, but never claimed membership to a particular sect. *Id.* at 834.

[62] *Id.* at 831. The Board of Review decided that a suitable offer of work was refused without good cause. *Id.* The Board also stated that actions based on religious convictions must be based on accepted religious tenets, and Frazee's personal beliefs were immaterial. *Id.* at 830.

[63] *Id.* at 831. The Appellate Court of Illinois, in affirming the lower court's denial, made it clear that the sincerity of the claimant's belief was unquestionable, and the belief in this case was simply not in the proper religious context. *Id.* The court distinguished *Sherbert*, *Thomas*, and *Hobbie* because Frazee was not a member of a religious sect or church, as the claimants in the preceding cases were. *Id.*

[64] *Id.* at 831-32. The Supreme Court recognized the distinction set out by the lower court, but held that none of the preceding cases was decided on that point. *Id.* at 833. The Court stated the standard in those cases was that the "claimants had a sincere belief

The Court noted that although membership in a sect would simplify the identification of sincerely held religious beliefs, there was no doubt at the trial court level that the appellant was sincere in his belief.[65] The Court further stated that the requirement of a compelling state interest was not satisfied by the fact that Sunday work has become commonplace in today's society and was not sufficient to override a legitimate free exercise claim.[66]

In the instant case, the Mississippi Supreme Court first reasoned that since unemployment benefits were generally available to the involuntarily[67] unemployed,[68] then the state could not deny the benefit where the individual refused to forsake sincerely held religious beliefs.[69] In such a case, the state does not have an interest compelling[70]

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that religion required him or her to refrain from the work in question." *Id.* The Court also pointed out that purely secular views would not merit protection under the free exercise clause. *Id.*; *see* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (compulsory school attendance inapplicable to those attending religious secondary education); United States v. Seeger, 380 U.S. 163, 166 (1965) (whether given belief that is sincere occupies place in life of possessor is test for belief in God).

[65] *Frazee*, 489 U.S. at 834. The Court iterated the sincerely held religious belief of Frazee, and held that the belief merited first amendment protection. The Court also found his sincerity conclusive under their scope of review, for the state conceded this point in its brief. *Id.*; *see* Shannon Eng'g & Constr. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 449 (Miss. 1989) (appellate courts without authority to disturb agency's conclusions where substantial evidence supportive); Mississippi Employment Sec. Comm'n v. Sellers, 505 So. 2d 281, 283 (Miss. 1987) (appellate court had limited scope of review in unemployment benefit cases).

[66] *Frazee*, 489 U.S. at 835. The Court rejected the lower court's justification for the denial of benefits. *Id.* The mere fact that a majority of people chose to work and recreate on Sunday failed to gain merit with the Court. *Id.*; *see* Detroit Gravure Corp. v. Michigan Employment Sec. Comm'n, 366 Mich. 530, 115 N.W.2d 368, 369 (1962) (claimant's refusal to work Sunday shift for religious reasons was not misconduct).

[67] Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324, 329. The court noted that those appointed to administer public schools had broad authority which the law would "brook but little interference." *Id.* at 327-28. Public schools had authority to promulgate reasonable dress codes where it did not infringe rights otherwise protected. *Id.* at 328. The majority expressed that public school employees were entitled to exercise rights protected by the First Amendment of the United States Constitution and article 3, section 18 of the Mississippi Constitution, without fear that their employment would be affected. *Id.* "[N]o preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred." MISS. CONST. art. 3, § 18.

[68] *McGlothin*, 556 So. 2d at 329. The court recognized that the gratuitous benefit entitlement was available to all under objective criteria. *Id.*

[69] *Id.* In a footnote, Justice Robertson pointed out that the court assumed, without deciding, that some situations involve conduct that may give rise to loss of employment while unemployment benefits must be given because of the state's lack of compelling

enough to overcome religious rights.[71] Also, the court determined since first amendment protections do not require that the conduct be mandatory, by doctrine or teaching,[72] then the only requirement of the conduct is to be expressive of sincerely held religious beliefs.[73] The court added that since affiliation with a particular denomination is not a prerequisite to first amendment protection, then it was of little consequence that appellee did not meet with a religious group regularly.[74] Likewise, the court concluded since the first amendment does not require consistency in the conduct,[75] then appellee's selectivity in her conduct did not remove her from its protection.[76] Since the court found that appellee's conduct was constitutionally protected religious and cultural expression, then the Mississippi Employment Security Commission had no authority to deny her claim for benefits.[77]

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interest in withholding compensation. *Id.* at 329 n.5.

[70] *Id.* at 329. The court noted that compelling governmental restrictions were those so closely related to the educational mission that a violation of those restrictions would result in the impairment of the overall mission. *Id.* The court had no doubt that a school could proscribe a native American Indian teacher from coming to school in the scantily clad attire of an Indian warrior, or a Christian teacher disrobed, emulating Adam before the fall, although both would be religious expression. *Id.*

[71] *Id.* at 329. In grappling with the question of what constituted a religious belief, the court stated that the question did not hinge upon judicial perception of the particular belief, or its acceptability, logic, or consistency in order to exist under the protection of the first amendment. *Id.* The purpose of the amendment was to protect the individual from a state imposed burden created from a general opinion that the belief was unacceptable. *Id.*

[72] *Id.* at 330. The court held that first amendment protection did not require that the exercise be expressly or tacitly stated as a religious facet of that sect. *Id.* And equally, the fact that members of that sect disagreed with the appellee's interpretation of church dictate was of no concern. *Id.*

[73] *McGlothin*, 556 So. 2d at 330. The court stated that sincerity was the key to what constitutes religious belief in a constitutional setting, and that the belief should be well grounded in religion. *Id.* Hence the court took judicial notice that it was common practice in many religions to cover the head as a matter of religious and customary practice of culture. *Id.*

[74] *Id.* The court acknowledged that the existence of this particular sect's denominational congregation in the Jackson area to which appellee did not belong. *Id.*

[75] *Id.* The court also indicated that if consistency in conduct was required by the first amendment, those who are "backsliders" would not be afforded its protections. *Id.*

[76] *Id.* The court held that the standard required sincerity, and the Justices noted assumption of the risk of discharge as demonstrative of sincerity. *Id.*

[77] *Id.* at 331. The majority stated that among the fundamental values schools were supposed to teach, tolerance of divergent political and religious views was important, to avoid choking the free mind at its source. *Id.* After finding no adverse impact on students, appellee's job performance, or the school mission, the court held that no compelling overriding interest existed to take the conduct out of the realm of the first amend-

In a dissent,[78] Justice Dan Lee stated that since the decision being reviewed was that of the Employment Security Commission, then the proper standard of review was that the findings of the board "shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."[79] He further noted that since the sincerity of the religious belief was at issue,[80] then the fact finder should answer this question.[81] Justice Lee asserted since the "truth" of a belief is unquestionable, then the significant question that remained was whether the belief was truly held.[82] Lee concluded that since the majority opinion rested on the assumption that appellee's belief was sincere, then the court ignored the scope of review and substituted its own opinion for that of the fact finder.[83]

The Mississippi Supreme Court in *McGlothin* consistently applied the constitutional doctrines set forth in United States Supreme Court precedent.[84] The Mississippi Supreme Court gave proper recognition to the strict scrutiny involved in the first amendment exercise of religion[85] and the compelling state interest necessary to override an in-

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ment protection. *Id.*

[78] *McGlothin*, 556 So. 2d at 331 (Dan Lee, P.J., dissenting). Justice Roy Noble Lee joined in the dissent. *Id.*

[79] *Id.* at 333 (citing Miss. Code Ann. § 71-5-31). Justice Dan Lee pointed out that it was the referee's duty to ascertain that ample predicate for invoking the free exercise clause existed, and the burden of proving such constitutional protection rested with McGlothin. *Id.* at 331. Also, Lee added that the scope of review, limited to questions of law, applied to both the circuit courts and the supreme court. *Id.* at 333.

[80] *Id.* at 331. Justice Dan Lee also stated that to meet the burden of constitutional protection, it was incumbent upon McGlothin to show that her actions were grounded in a sincere religious belief which motivated her conduct. *Id.*

[81] *Id.* at 333. Justice Lee recounted that the referee's finding of fact demonstrated no clear evidence of sincerity. This did not justify an assumption of sincerity by the circuit or supreme court. *Id.* at 333.

[82] *Id.* Justice Lee regarded the question of whether the belief was truly held as the threshold question of sincerity which was eminent in every such case. *Id.* Justice Dan Lee again emphasized that this was a question of fact and a prime consideration in the validity of the exemption claim. *Id.* In a separate dissent, joined by Justices Dan Lee, Roy Noble Lee, and Sullivan, Justice Blass concluded that McGlothin was not required to choose between her religious beliefs and employment. *Id.* at 334 (Blass, J., dissenting).

[83] *McGlothin*, 556 So. 2d at 334. Justice Dan Lee argued that in those cases where there was a failure to make a necessary finding, the court may make assumptions in favor of the appellee. *Id.* But he stated that this was not a failure to make a necessary finding, but instead it was an ambiguous finding which did not call for any assumptions. *Id.*

[84] *See supra* notes 33, 34, 40, 41, 58, 65 and accompanying text.

[85] *See supra* notes 33, 42-43, 58, 71 and accompanying text.

fringement of that exercise.[86] The court also corroborated the Supreme Court's finding in *Frazee* that the sincerity of the religious belief is the paramount requirement for first amendment protection.[87] The policy reflected by *McGlothin* acknowledges the diversity of American culture and religion, which has been a resounding theme in American jurisprudence since the birth of the nation.[88] *McGlothin* reaffirmed the sanctity of free expression of religion, with minimal constraints only where proper proof of a compelling state interest is offered.[89] The court clearly announced that unemployment compensation is not excluded from first amendment protection even though there is no constitutional right to such benefits.[90] The Mississippi Supreme Court noted that the protection should extend to such benefits in light of their use as a tool to discourage, directly or indirectly, the free exercise of religious expression.[91] To hold otherwise in this case would contradict the express principles of the United States Constitution.[92]

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[86] *See supra* notes 33-34, 72 and accompanying text.
[87] *See supra* notes 61-67, 74 and accompanying text.
[88] *See supra* notes 14, 15 and accompanying text.
[89] *See supra* text accompanying notes 58, 71-72.
[90] *See supra* notes 29, 68-70, 78 and accompanying text.
[91] *See supra* notes 43, 67, 78 and accompanying text.
[92] *See supra* note 14.

BOOK REVIEW

METAPHOR AND METHOD IN FREE SPEECH JURISPRUDENCE

THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE

By: Steven H. Shiffrin*
Cambridge, MA, Harvard University Press 1990
Pp. viii, 285. $35.00

*Reviewed by Timothy L. Hall***

I. INTRODUCTION

The haphazard construction of first amendment jurisprudence, with its skewed angles and ill-fitting joints, has been a persistent cause of scholarly consternation.[1] Legal scholars have

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[1] *See, e.g.*, Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 526 (describing free speech law as characterized by "a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices"); T. EMERSON, THE SYSTEM OF FREEDOM EXPRESSION 15 (1970)("The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.").

accordingly responded to this perceived disarray by proposing one after another "grand theories" to bring order to the diverse issues that fall under the heading of free speech law.[2] Alexander Meiklejohn, for example, proposed that the free speech guarantee was intrinsically linked with this country's commitment to self-government.[3] Other commentators have sought to root the first amendment's protection of speech in the usefulness of speech in "checking" the abuses of political officials,[4] or in the role that speech plays in self-realization or self-fulfillment.[5]

Shiffrin's book[6] is both within the scholarly tradition of generating grand theories and a repudiation of that tradition. He joins the line of scholars such as Meiklejohn who have sought to articulate some organizing principle for the first amendment by suggesting his own principle: protection of dissent. Yet, Shiffrin refuses to claim for this principle any exclusive interpretive status for first amendment jurisprudence, and this refusal reflects the extent to which he departs from the grand theory tradition. The refusal to privilege any single interpretive principle for the first amendment illustrates the second major focus of Shiffrin's book, his advocacy of an "eclectic" method of resolving free speech disputes. According to Shiffrin, this "eclectic" method is none other than that which has characterized first amendment law during this century.

Shiffrin's book represents then more a modest adjustment to reigning first amendment jurisprudence than a fundamental paradigm shift.[7] In the remainder of this review, I consider in

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[2] The scholarly impulse to fashion grand theories concerning free speech is a subset of the broader impulse to create grand theories concerning the constitutional order. For a general survey and criticism of this broader impulse, see M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 21-187 (1988).

[3] A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).

[4] *See* Blasi, *supra* note 1.

[5] *See* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (true value of free speech is individual self-realization).

[6] S. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) [specific references to the work are hereinafter indicated by page numbers without further citation].

[7] In contrast with Shiffrin's more modest proposals, first amendment scholarship is undergoing a fairly radical shift in other quarters. From one direction, scholars have expressed disappointment with traditional free speech analysis in cases involving racist speech. *See, e.g.*, Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 1331 (1982); Lawrence, *If He Hol-*

turn Shiffrin's argument in terms of a proposed metaphor for interpreting the first amendment and a proposed method.

II. The First Amendment and Metaphor

The first amendment declares in what appear to be absolute terms that Congress "shall make no law . . . abridging the freedom of speech."[8] Nevertheless, a majority of Supreme Court Justices and legal scholars have joined in agreeing that what appears absolute cannot, as a matter of constitutional reality, be absolute.[9] "Irresistible counterexamples"[10] have proven more

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lers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989). On another front, similar objections to traditional free speech jurisprudence have been expressed in connection with feminist critiques of pornography. *See, e.g.*, MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1 (1985); Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 Harv. Women's L.J. 1 (1985). From yet another quarter, critical legal studies scholars have challenged fundamental concepts embedded in current first amendment law. *See, e.g.*, Balkin, *Some Realism About Pluralism: Legal Realist Approaches to The First Amendment*, 1990 Duke L.J. 375 (challenging distinction between public and private action in connection with free speech rights by asserting that state is responsible for structures of power that allow private actors to interfere with or constrict opportunities to exercise speech rights).

[8] *See generally* Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 Cal. L. Rev. 107, 110 (1982)(contrasting absolute character of freedom of speech guarantee with more equivocal protections against "unreasonable" searches and seizures under fourth amendment, guarantee of "due process" under fifth amendment, and prohibition of "excessive" bails and fines as well as "cruel and unusual" punishments under eighth amendment).

[9] *But see* Konigsberg v. State Bar of California, 366 U.S. 36, 60-61, 68 (1961)(Black, J., dissenting, joined by Warren, C.J., and Douglas, J.):

> The recognition that California has subjected "speech and association to the deterrence of subsequent disclosure" is, under the First Amendment, sufficient in itself to render the action of the State unconstitutional unless one subscribes to the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgement of those freedoms. As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. The history of the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of

convincing than textual literalism. Shiffrin mentions the most famous counterexample and concludes that "[t]he specter of a man crying fire falsely in a crowded theatre crushed absolutism as a serious intellectual position."[11] Surely, it has been believed, the first amendment is not a barrier to the regulation of such speech. It was, after all, *freedom of speech* and not speech itself that the Constitution made Congress powerless to abridge.[12]

If the freedom of speech is not absolute, then the difficult task becomes one of articulating principles for determining what kind of speech delivered under what kinds of circumstances is protected by the first amendment. This enterprise has, in its turn, thrown theorists back upon the more fundamental question of what value or values should be protected by the free speech guarantee.[13] On this question, a diverse panoply of values has been suggested.[14] The core of Shiffrin's challenge to existing first amendment doctrine is directed to its too confident linkage of the first amendment and the political process. Alexander Meiklejohn is probably the most influential proponent of the view that "[t]he principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues

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> Rights out of existence. . . . It seems to me that the Court's "absolute" statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views.

See also Barenblatt v. United States, 360 U.S. 109, 143-44 (1961)(Black, J., dissenting) (discussing insufficiency of balancing test analysis); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963) (first amendment is absolute denial of governmental power in area of free speech).

[10] *See* Van Alstyne, *supra* note 8, at 113.

[11] P. 14; *see* Schenck v. United States, 249 U.S. 47, 52 (1919)(Holmes, J.)("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[12] P. 18.

[13] Professor Schauer, however, has attempted to provide an interpretive framework for the first amendment that focuses upon the peculiar incapacity of government to regulate speech rather than upon any intrinsic value of speech itself. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80-85 (1982) (free speech principle emerges by negative implication); Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1299-1303 (1983) (dangers of excess governmental regulation is sufficient justification for freedom of speech).

[14] *See generally supra* notes 3-5. *See also* T. EMERSON, *supra* note 1, at 6-7 (suggesting values).

shall be decided by universal suffrage."[15] This thesis, which links the freedom of speech with the right of citizens to participate in the political process, resonates with the echoes of the early free speech victory in the trial and acquittal of John Peter Zenger in 1735 for seditious libel against the governor of New York.[16] It has received substantial scholarly support[17] and has captured an important place in the Supreme Court's rhetoric concerning the first amendment.[18]

However, as Shiffrin points out, by linking the first amendment to protection of speech discussing "public issues" such as are relevant to participation in the political process, the original Meiklejohn thesis omitted large areas of speech from protection: for example, literary, philosophical, and scientific writings.[19] Accordingly, Meiklejohn eventually modified his thesis to grant protection to "novels and dramas and paintings and poems," arguing that such literary forms provided citizens with "knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."[20] This revision is as awkward as the Court's at-

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[15] A. MEIKLEJOHN, *supra* note 3, at 27. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

[16] *See* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz ed. 1963).

[17] *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 105-16 (1980); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 304-22 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 204-17.

[18] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976)(per curiam)("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ."); Mills v. Alabama, 384 U.S. 214, 218 (1966)("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)(free speech guarantee expresses "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[19] P. 48.

[20] Meiklejohn, *The First Amendment Is an Absolute*, *supra* note 15, at 263, 256.

tempt to link commercial speech with the political process,[21] and has the same effect: it broadens the concept of political speech to such an extent that it ceases to have any interpretive usefulness.[22]

Shiffrin also advances a more sweeping criticism of attempts to link freedom of speech with political participation by denying what seems at first glance an unarguable axiom of American political theory: that American democracy is centered in the concept of majority rule. On this point Shiffrin points in the first place to crucial anti-majoritarian strains in American public life, including the concept of judicial review, the Bill of Rights, the structure of the Senate (in which Delaware has as many seats as New York), and the power and influence of anti-majoritarian institutions such as large corporations (including the institutional press).[23] He denies in the second place that majority rule in the United States is a reality in practice by pointing to the difference between the majority's power to elect public officials, on the one hand, and to determine the actual policy decisions made by those officials, on the other hand.[24] Finally, Shiffrin denies that majority rule is even desirable, arguing that a system of well-informed public officials who take seriously the preferences of their constituents but who can and should make independent decisions about what is in the public's best interest is preferable to majority rule.[25]

With respect to the usefulness of the Meiklejohn thesis in explaining what kinds of speech ought to receive first amendment protection, the arguments Shiffrin marshals are, I think, decisive. However, a modified version of the Meiklejohn thesis might have some use in justifying the protection of speech generally, as opposed to other forms of human activity. It is possible to state the connection between speech and democracy in a

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[21] *See* Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 765 (1976)(information concerning drug prices vital not only to consumer choices in market system but also to "formation of intelligent opinions as to how that system ought to be regulated or altered").

[22] Pp. 48-49; *see* L. TRIBE, CONSTITUTIONAL LAW 786-87 (2d ed. 1988).

[23] Pp. 58-63.

[24] Pp. 63-64.

[25] Pp. 64-66.

broader fashion than that urged by Meiklejohn. For example, although Shiffrin quotes John Hart Ely's contention that "majoritarian democracy is . . . the core of our entire system,"[26] Ely elsewhere characterizes the relationship between speech and the political process in broader terms by focusing upon the first amendment's "central function of assuring an open political dialogue and process."[27] One may accept Shiffrin's assault on the reality or even the desirability of actual rule by a majority of citizens without surrendering the belief that speech is crucial to the American political process, including both its majoritarian and anti-majoritarian aspects. This reconfiguration of the Meiklejohn thesis might salvage it as at least a partial explanation for the preferred protection given speech. Moreover, although the thesis would still remain either too broad or too narrow to serve as the basis for categorical protection of a specific class of speech, it might nevertheless serve to give speech about matters of public concern "a plus" in a more elaborate balancing of various interests and values implicated by a given first amendment case.[28]

However, instead of making politics the core of free speech, Shiffrin, drawing from the tradition of American romanticism exemplified in Ralph Waldo Emerson and Walt Whitman,[29]

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[26] P. 56 (quoting J. ELY, *supra* note 17, at 7).

[27] J. ELY, *supra* note 17, at 112. David Richards, although no friend of the Meiklejohn thesis, nevertheless captures the essence of a broader concept of the relationship between speech and politics in a recent book review. *See* Richards, *A New Paradigm for Free Speech Scholarship* (Book Review), 139 U. PA. L. REV. 271, 278 (1990) (reviewing C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989))("Free speech insures a constitutional space for the kind of reasonable public argument, open debate, and criticism to which, on grounds of constitutional legitimacy, all forms of political power must be subject.").

[28] This is the kind of approach suggested by Shiffrin with respect to the use of dissent as a first amendment value. *See* p. 106.

[29] Shiffrin's celebration of dissent appears on its face at odds with recent communitarian impulses. His heroes—Emerson and Whitman—are at best tarnished and at worst semi-villains in this recent strain of writing. *See* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 33-35, 55-56 (1983). Although Shiffrin notes that dissent has a communitarian aspect, it is clear that the tradition upon which he relies champions the individual over the group. Pp. 90-92. Emerson, whom Shiffrin adopts as a saint of free speech, declared in a portion of his essay on self reliance that Shiffrin did not, but could have quoted, "It is only as a man puts off all foreign support and stands alone, that I see him to be strong

urges that dissent should be given this central position. He links democracy with dissent, arguing that the freedom of citizens to "speak out against any of the existing institutions, habits, customs, and traditions" lies at the heart of the American political tradition.[30] Thus, Shiffrin would make the central metaphor of the first amendment not the citizen speaking at the town hall but the Emersonian self-reliant man or woman saying "No!" to society's conventions.

According to Shiffrin, if dissent were placed at the center of first amendment values, then a variety of cases would be treated differently. I emphasize "treated" here, since Shiffrin regularly avoids indicating whether he would apply the dissent value to reach an opposite conclusion to that actually reached in the cases he discusses.[31] Thus, he criticizes the analysis of *Connick v. Myers*[32] for making its crucial focus the question of whether the speech involved was a "matter of public concern."[33] In *Connick*, a New Orleans Assistant District Attorney, objecting to being transferred by the District Attorney to a different section of the criminal court, had circulated a questionnaire to her coworkers "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[34] She was fired for insubordination, and the Supreme Court upheld the firing against a challenge that it violated the

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and to prevail. He is weaker by every recruit to his banner. Is not a man better than a town?" R. EMERSON, *On Self Reliance*, in RALPH WALDO EMERSON 281-82 (Library of America ed. 1983). And Mill, another of Shiffrin's saints, specifically identified the protection of the lone dissenter as the archetypical example of freedom of speech. "If all mankind minus one were of one opinion," he declared, "mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." J. MILL, ON LIBERTY 16 (E. Rapaport ed. 1978).

[30] Pp. 77-78.

[31] P. 55 (referencing various cases standing well outside the core of protected first amendment speech but within its fringes and concluding that "[i]t may be that some of these decisions are justified"); pp. 107-08 (discussing Rankin v. McPherson, 483 U.S. 387 (1987), and stating that "the analysis of dissent and its value will often be specific to diverse factual contexts and . . . reasonable people can differ about how it should be applied").

[32] 461 U.S. 138 (1983).

[33] Pp. 74-78.

[34] *Connick*, 461 U.S. at 141.

first amendment's free speech guarantee. Shiffrin complains that both the majority and the dissent contort the real issues at stake by attempting to frame the question as whether the speech involved related to public issues. He argues that the mere fact that the Assistant D.A. was challenging "existing customs, habits, conventions, processes, and institutions" should have placed her at the heart of the first amendment. But Shiffrin balks at the point of demonstrating how a focus upon dissent would have affected the outcome of the case.[35] He allows that her claim might still be defeated by the government's interest in maintaining a stable workplace in the public employment context; nevertheless, he maintains that no one should escape the hard issues posed by the case by denying that first amendment values are at stake.[36]

According to Shiffrin, the rhetoric of dissent would justify, at least in part, the relatively poor treatment of commercial speech under current law. In terms of dissent, it is not hard to see a difference between burning a draft card and airing a commercial advertisement. "When David O'Brien burns a draft card, we witness an act of dissent. When General Motors gives us a pitch about the glory of Chevrolet, we run for the refrigerator. To sing 'We shall overcome,' is to join a protest movement; to sing 'Things go better with Coke,' is to protest nothing."[37] A focus on dissent also explains, better than Meiklejohn's political speech theory, the protection of literature. "The fight to protect a work of D. H. Lawrence is less a fight for truth than it is a struggle to maintain a symbolic understanding of America as a country where people have the right to experiment, to be independent, to dissent from the everyday understandings."[38]

Shiffrin also locates in the image of dissent an important

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[35] P. 79. Shiffrin states that "[O]ne can only speculate what the outcome of *Connick v. Myers* might have been if a different rhetoric [i.e.—a rhetoric of dissent] had animated first amendment decisionmaking from *Schenk* onward." *Id.*

[36] Pp. 77-78. Similarly, Shiffrin argues that elevating dissent to the status of a core first amendment value would have resulted in different treatment of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld sanctions against a radio station for broadcasting George Carlin's "Filthy Words" monologue, and *United States v. O'Brien*, 391 U.S. 367 (1968), which upheld a conviction for burning a draft card. Pp. 80-81.

[37] P. 82 (footnote omitted).

[38] P. 83.

alternative to the metaphor of a marketplace of ideas.[39] One may value an exercise of dissent even when it is not possible to claim that truth has been kept from the marketplace.[40] Moreover, dissent focuses attention on a different cluster of values than the marketplace metaphor.

> If the marketplace metaphor encourages the view that an invisible hand or voluntaristic arrangements have guided us patiently, but slowly, to Burkean harmony, the commitment to sponsoring dissent encourages us to believe that the cozy arrangements of the status quo have settled on something less than the true or the just. If the marketplace metaphor encourages the view that conventions, habits, and traditions have emerged as our best sense of the truth from the rigorous testing ground of the marketplace of ideas, the commitment to sponsoring dissent encourages the view that conventions, habits, and traditions are compromises open to challenge. If the marketplace metaphor counsels us that the market's version of truth is more worthy of trust than any that the government might dictate, a commitment to sponsoring dissent counsels us to be suspicious of both. If the marketplace metaphor encourages a sloppy form of relativism (whatever has emerged in the marketplace is right for now), the commitment to sponsoring dissent emphasizes that truth is not decided in public opinion polls.[41]

But the choice of dissent as a core value of the first amendment (though not the only value)[42] leaves unexplained the same crucial issue unaddressed by free speech grand theories that focus upon the value of speech in terms of self-realization. Many activities might be self-fulfilling to an individual or enhance the individual's self-realization. But the first amendment appears to single out only speech for protection.[43] Similarly, the romantic tradition which Shiffrin invokes advocates not simply verbal dis-

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[39] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (suggesting metaphor).

[40] Pp. 81, 83.

[41] P. 95.

[42] *See* p. 105 (conceding that dissent is not only value of speech).

[43] *See* F. SCHAUER, *supra* note 13, at 52 ("Speech as communication is of course a method of self-expression, but the concept of self-expression is not helpful to an analysis of free speech.").

sent, but a life which itself spurns convention. It is possible to reject existing conventions by moving a mobile home onto the front yard of a high priced residential neighborhood or riding a motorcycle without a helmet or attending law school in the nude. But the invocation of romantic iconoclasm would probably not be linked to any constitutional barrier to the government regulation of these activities.

Having stated this limitation to dissent as a first amendment value, I must state my agreement with Shiffrin that the value of dissent probably better expresses the general value of speech recognized within the American tradition than the self-government value proposed by Meiklejohn. Especially if one accepts Shiffrin's argument concerning the appropriate method for first amendment analysis, then the incorporation of dissent as a value to be weighed in the balancing of relevant issues appears as a needed corollary to impulses to concentrate on a more narrow focus of values.

III. The First Amendment and Method

The second half of Shiffrin's book advocates a particular method for the resolution of first amendment cases, a method both in harmony with his emphasis upon dissent as a core value of the first amendment and in tension with the privileging of any value, including dissent. This method he names "romantic eclecticism."[44] It is *eclectic* in that it functions from the premise that "there are too many principles that interact in too many complicated ways in too many concrete contexts to warrant any realistic hope that any general theorist's project could succeed."[45] It is romantic in that it emphasizes

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[44] P. 139.

[45] P. 122. Shiffrin's eclecticism appears to be synonymous with and shares the same fuzziness as pragmatism. For Shiffrin's apparent equation of eclecticism with pragmatism, see pp. 7, 114. On the problems of defining legal pragmatism itself, see Smith, *The Pursuit of Pragmatism*, 100 Yale L.J. 409, 410 (1990)("[T]here is an emerging suspicion that if we look too closely for legal pragmatism, we might not find anything—or at least not anything worth discussing." (footnote omitted)). On the current enthusiasm for legal pragmatism, whatever its actual meaning, see Farber, *Legal Pragmatism and the Constitution*, 72 Minn. L. Rev. 1331 (1988) (arguing that constitutional law can be sufficiently based on legal pragmatism); *Symposium: The Renaissance of Pragmatism in American Legal Thought*, 63 S. Cal. Rev. 1569 (1990).

> the passions against abstract reason; the subjective against the objective; the concrete and the particular against the general and the universal; activity, dynamism, and movement against the frozen, static, and eternal; creativity, originality, imagination, and spontaneity against mechanical calculation, rote analysis, or artificial, bloodless routine; invention over discovery; and struggle over victory.[46]

Those who find in such descriptive torrents little hint of how "romantic eclecticism" works out in practice will find little help from Shiffrin. This portion of his book is less a demonstration of his method than an extended panegyric of it. Nevertheless, his overall aim is clear enough in general, however murky in particular. Shiffrin favors a methodology that focuses upon the factual concreteness of specific first amendment cases and balances the many competing interests represented by those cases without being restrained by artificial categories and standards of review. Shiffrin believes this method, guided by a commitment to dissent, will better secure the aims of the first amendment than competing methods.

Shiffrin introduces the discussion of "romantic eclecticism" as a method for first amendment decision-making by challenging the normal scholarly impulse of creating grand theories to interpret the first amendment. He does this by critiquing one particular category of such theories: Kantian free speech theories.[47] His critique of Kantian grand theory continues a general critique of grand theory begun in the first chapter of *The First Amendment, Democracy, and Romance.* There he challenged the use of such categories as the content/conduct distinction frequently posited by commentators as a theoretical framework for understanding first amendment jurisprudence.[48] He argued that

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[46] P. 141 (footnote omitted).

[47] P. 110. C. Edwin Baker is perhaps the most notable among the proponents of Kantian speech theories. *See, e.g.*, Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). The work of David Richards should also be added to this list. *See, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

[48] *See, e.g.*, L. TRIBE, *supra* note 22, at 789-92 (distinguishing between government regulations aimed at "communicative impact of an act" and those aimed at the "noncommunicative impact of an act").

the content/conduct distinction, for example, "failed as an organizing framework for first amendment law" and that the Supreme Court's methodology had been eclectic rather than showing adherence to any rigid categorical distinctions.[49] When he turns to a critique of Kantian methodology his basic attack is again to pit the abstractness of general theory against the necessity of concrete solutions to factually specific problems.

Kantian theorists have attempted to bring order to the free speech guarantees by privileging one principle: respect for the moral autonomy of individuals. For the Kantian, the key characteristic that distinguishes man from animal is the capacity to make independent moral judgments. Kantians would thus protect the ability to make such judgments against every infringement so long as one individual did not interfere with the rights of another.[50] By using this one principle to elaborate first amendment doctrine, Kantian theorists promise to provide a rational basis for decision-making, integrity of decision-making by avoiding self-serving and parochial approaches, an appeal to human dignity, and a progressive basis for criticism of existing social relations.[51]

Shiffrin attacks the use of a Kantian principle of protecting moral autonomy by demonstrating its inability to provide determinate results in specific cases. What sounds impressive at a high level of abstraction looks mushy at the concrete level. For example, Shiffrin focuses upon one category of first amendment cases—those relating to defamation—and argues that the Kantian respect for moral autonomy does not provide a basis for resolution of these cases. Here Shiffrin relies partially on the disagreement between Kantians. Kant believed that reputation was a right and that defamation was not a part of free speech; the Kantian theorist C. Edwin Baker argues that there is no right to reputation.[52] This disagreement represents what Shiffrin finds to be a key weakness of Kantian theories: their inability to establish a coherent theory for assigning rights and defining free-

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[49] Pp. 29, 33.
[50] Pp. 114-16.
[51] Pp. 123-24.
[52] P. 116.

dom.[53] But his primary assault on Kantianism is to produce a torrent of detailed questions and to challenge the ability of any abstract principle, including the Kantian principle of moral autonomy and equal respect for persons, to provide answers to these questions.

> One might want to know, for example, what the impact of any proposed rule might be on truthful speech. That impact might differ between media and nonmedia defendants; it might differ between types of media. The notion of what constitutes care might be more or less useful in different contexts. It might be well applied by juries; it might not. One might, in assessing the application of the proposed right, want to know what remedies followed from the finding of a violation. Would compensation be available only for financial loss or would compensation be provided for the wounded feelings of victims? Would limits be imposed on such recoveries? Would insurance be permissible for such damages? Would it be available and in what amounts? Should a deprivation of the right give rise to punitive damages? Injunctions? Under what circumstances?[54]

In contrast with grand theory methodologies, including Kantian methodologies, Shiffrin argues that first amendment jurisprudence of this century has been, and ought to be, eclectic in nature. He suggests three features of this eclecticism: (1) its reliance upon balancing, (2) its development of a variety of tests and approaches and its recognition of a variety of values implicated by the first amendment, and (3) its application of the balancing process not simply to two opposing principles but to a multitude of claims.[55]

As against the grand theorist perturbed by the disorderliness of free speech cases, Shiffrin makes their very riotousness a virtue. He thus supports the reigning method of first amendment decision-making.[56] His complaint with the Court's general approach to first amendment cases is that it has of late tended to be too orderly, too reliant upon standards of review, and too

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[53] Pp. 117-20.
[54] Pp. 117-18.
[55] Pp. 132-33.
[56] P. 111.

unwilling to confront the diversity of values and concrete experiences presented by actual cases.[57] But in general, he supports the hurly-burly of first amendment law as it is and opposes the normal scholarly impulse to create jurisprudential theories of geometrical precision.

One might characterize Shiffrin's approach to the first amendment as enlivened more by a poetic than a legal imagination. After all, the heroes of his book—Ralph Waldo Emerson and Walt Whitman—were poets rather than lawyers. And to those who would find a single value in the first amendment, looming like a towering peak above the lowlands of competing interests, Shiffrin responds in the manner of the squirrel arguing with the mountain in Emerson's poem "Fable":

> You are doubtless very big;
> But all sorts of things and weather
> Must be taken in together,
> To make up a year
> And a sphere.[58]

The mountain carries forests on its back; but it cannot, says the squirrel, "crack a nut."[59] Shiffrin also seems to have taken as his banner William Carlos Williams' poetic maxim: "No ideas but in things."[60] He clearly would have agreed with Williams that "we know nothing, pure and simple, beyond our own complexities."[61] The nut-cracking particular over the forest-bearing general, the concrete rather than the abstract, the complex rather than the artificially simple—these are Shiffrin's virtues.

Shiffrin's discussion of first amendment method is situated within the ongoing controversy between those who would protect speech through the use of broad categorical distinctions and absolute or semi-absolute rules and those who would engage in a more frank balancing of competing interests on a case-by-case basis.[62] But the very terms of this debate have sometimes been

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[57] P. 150.

[58] The Oxford Book of American Light Verse 38 (W. Harmon ed. 1979).

[59] *Id.*

[60] W. Williams, Paterson 9 (1963).

[61] *Id.* at 3.

[62] *See generally* Schlag, *An Attack on Categorical Approaches to Freedom of*

criticized, and the criticism seems to apply with special force to Shiffrin's analysis. "[T]he whole balancing 'war' seems . . . to have been a fruitless one, generating on the one hand an unnecessary philosophic debate and obscuring on the other by its large rhetoric, a hard technical free speech issue."[63] One reads Shiffrin's ebullient paeans to romance and comes away hungry for more morsels of "hard technical" analysis of specific free speech issues. For example, he acknowledges that rules may be useful in certain contexts of first amendment jurisprudence, but that ad hoc adjudication may be preferable in other contexts.[64] This point cries out for an illustration, for many illustrations, of when and where rules provide more security and better results with respect to freedom of speech than ad hoc adjudication.[65] Shiffrin concludes his first chapter insisting that "we do demand some meaning, some integrity, some substance from interpretations of the first amendment."[66] "We want," he writes, "more than social engineering."[67] I would say something similar about Shiffrin's methodology. We want more than romance. We want, and need, more than a rhetorical flourish, more even than a cogent demon-

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Speech, 30 UCLA L. REV. 671, 731-39 (1983) (survey of this controversy and argument against use of categories and absolutes).

[63] Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 444 (1967).

[64] P. 133. Shiffrin occasionally revels in the rule/anti-rule distinction. *See* p. 150 ("Contemporary first amendment methodology could be characterized as antiromantic in the sense that it displays a preference for rules. Moreover, the argument of this book could be characterized as antiromantic in that it respects and applauds that preference. On the other hand, what does or does not fall within the romantic tradition is inevitably a question of context. From the perspective of the culture of first amendment scholarship, the argument of this book has been antirule." (footnotes omitted)).

[65] Pp. 133-39. Shiffrin does illustrate how ad hoc balancing might be preferable to a rule by discussing the circumstances under which reporters can be forced to reveal the identity of their sources. He points out that Branzburg v. Hayes, 408 U.S. 665 (1972), the leading case on this issue, has been interpreted to authorize ad hoc decisionmaking on this issue, pursuant to which a court weighs a variety of factors in reaching a determination. Pp. 133-39. Shiffrin notes that the late Professor Nimmer, a leading opponent of ad hoc balancing, had proposed a rule that would have been less protective of the press than the *Branzburg* balancing (i.e., so long as a grand jury was not acting in bad faith it could force revelation of sources). Pp. 15-16. What one really wants from Shiffrin, and what I did not find, was an illustration of a range of circumstances in which his romantic eclecticism would have found a rule preferable to ad hoc balancing.

[66] P. 45.

[67] P. 45.

stration of the weaknesses of other methodologies. We want to see how a pattern of ad hoc balancing, with perhaps a few judicious rules, will work. And Shiffrin, at least in this book, never really shows us.

IV. Conclusion

The First Amendment, Democracy, and Romance is a book about the rhetoric of free speech jurisprudence. Shiffrin rarely descends to the level of actual case analysis, and when he does, he does more frequently to criticize some particular grand theory than to demonstrate the practical workings of his own romantic eclecticism. But as John White has frequently reminded us, our language determines the structure of our character,[68] and the language chosen to talk about the first amendment will have profound consequences for the character of our national experience. Thus, although Shiffrin's study of the first amendment is largely a matter of rhetorical suggestion, rhetoric is important. We need to inspect and critique the metaphors that unconsciously condition the possibilities available to us in free speech analysis. Consequently, studies like Shiffrin's, which direct our attention to the broader metaphors that channel first amendment outcomes, are valuable contributions to the jurisprudence of free speech.

On the question of method, Shiffrin's analysis is equally gauged at a fairly abstract level. He is confident that, with the proper romance (the romance of dissent), a method that emphasizes the diversity and concreteness and complexity of actual experience will best serve the interests of first amendment jurisprudence. But I still have nagging doubts as to how well such a method is suited for what Professor Blasi has identified as the proper target of the first amendment: "the worst of times."[69]

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[68] J. White, Justice As Translation 23 (1990):

> The essential feature of our experience . . . is the structural reciprocity between language and character (or what we call personality or identity). Each of us is partly made by our language, which gives us the categories in which we perceive the world and which form our motives; but we are not simply that, for we are users and makers of our language too; and in remaking our language we contribute to the remaking of our characters and lives, for good or ill.

[69] Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev.

Shiffrin acknowledges that the Court has, by and large, followed an eclectic method over the course of this century.[70] Yet, this method has not shown itself to be of sterling virtue during "the worst of times."[71] Of course, Shiffrin attributes poor performance in the protection of speech to poor values rather than poor method,[72] but reasonable observers might remain skeptical as to whether a Court that accepted Shiffrin's panegyrics to dissent would be more capable of withstanding the wind of trouble than a Court armed with a few quasi-absolutes.[73]

449, 449-50 (1985). Blasi states that the first amendment should be interpreted to safeguard the most unorthodox of ideas—those that arise during the "worst of times." *Id.*

[70] Pp. 110-11.

[71] *See, e.g.*, Scales v. United States, 367 U.S. 203, 228-30 (1961) (affirming conviction for membership in Communist Party); Dennis v. United States, 341 U.S. 494, 510-11 (1951) (affirming conviction for conspiring to organize Communist Party of United States); Schenck v. United States, 249 U.S. 47, 52-53 (1919) (affirming conviction under Espionage Act of 1917 for defendant who mailed leaflets to men eligible for military service contending that draft was unconstitutional). For an interesting discussion of the *Scales* case, including excerpts from an interview with Junius Scales, see Cobden, Rodgers & Rudenstine, *Imprisoned for Membership: The Junius Scales Case*, 11 CARDOZO L. REV. 791 (1990).

[72] P. 110.

[73] *See* L. TRIBE, *supra* note 22, at 793 (absolutist approach may better protect expression—particularly in event of crisis).

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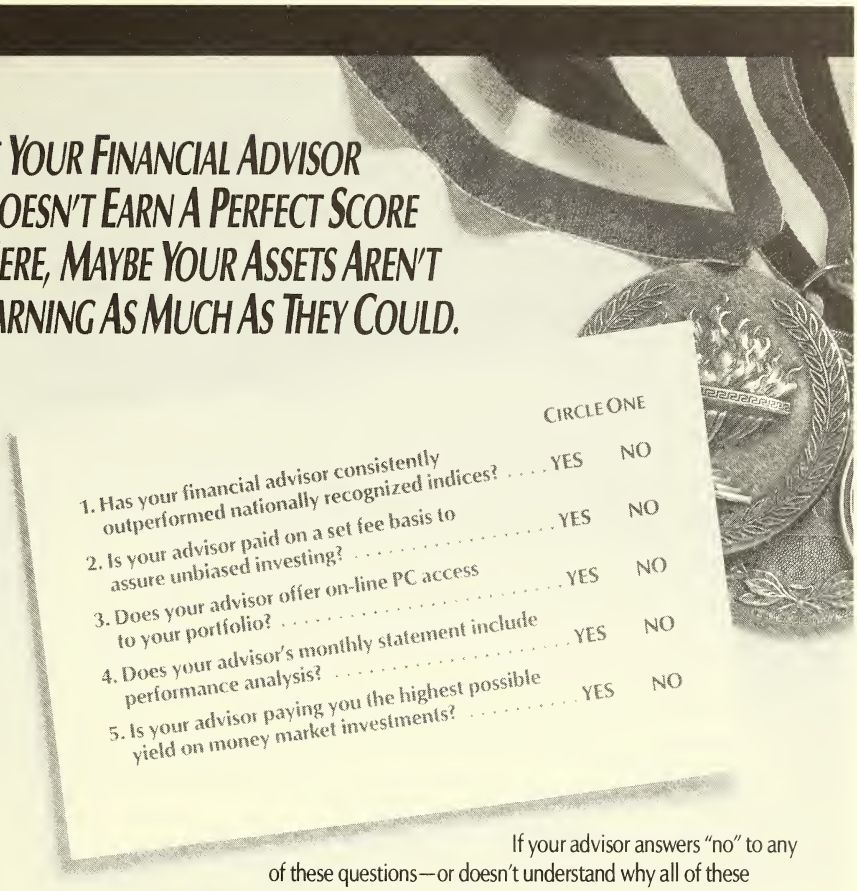

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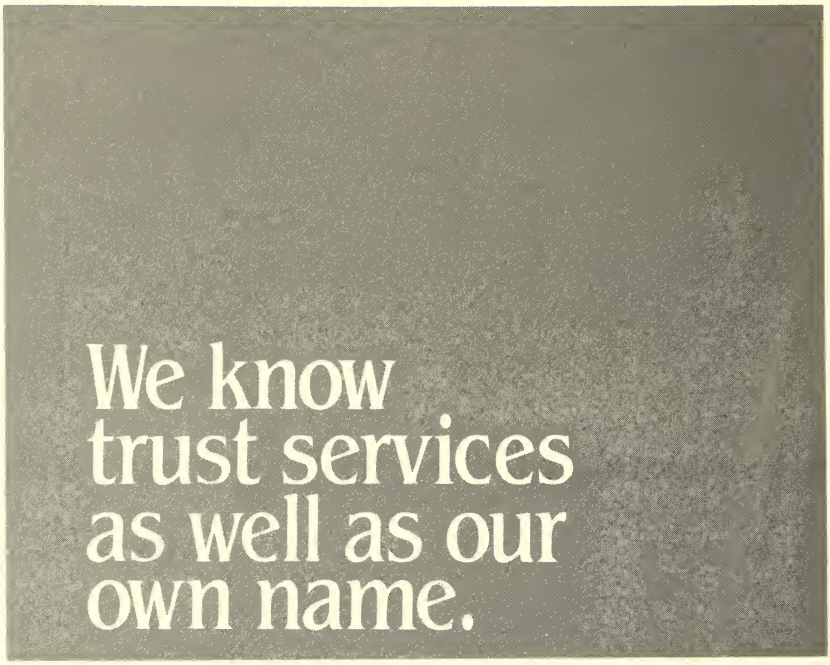

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